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THE
ONTARIO REPORTS,
VOLUME XV. 2452

CONTAINING
REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE
HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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OF THE

HIGH COURT OF JUSTICE

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MEMORANDUM.

On the 19th of June, 1888, the Queen was pleased to confer the honour of Knighthood on the Honourable THOMAS GALT, Chief Justice of the Common Pleas.

ERRATA

- Page 1, line 3, headnote, for "indemnity" read "indemnify."
- Page 66, line 4, headnote, for "undisturbed" read "undistributed."
- Page 76, line 9 from bottom, for *Williamson's Case* read *Wilkinson's Case*.
- Page 77, for "L. R. Ch. 536," line 10 from bottom, read "L.R.2 Ch. 536."
- Page 105, line 9 from bottom, insert a comma after the word "given" instead of a full stop.
- Page 189, 2nd line headnote, for "void" read "valid."
- Page 353, headnote, last line, for "Division" read "Divisional."
- Page 389, end of line 7, headnote, for "defendant" read "plaintiff."
- Page 476, line 10 from top, for "12 A. R." read "13 A. R."
- Page 558, line 4 of headnote, for "arrangement" read "engagement."
- Page 595, head note, after the words "sec. 10" insert "as amended by 44 Vict. ch. 25, sec. 12 (O.)"

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

CORBY V. GRAY.

*Mortgage—Rights and liabilities of purchaser of equity of redemption—Sale
subject to mortgage—Liability to indemnify—Parol evidence.*

Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if, under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser.

Parol evidence, however, could not have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity.

THIS was a mortgage action brought by the plaintiff as mortgagee, against one Grinrod, the mortgagor, and one Gray, as present owner of the equity of redemption by conveyance, from Grinrod, in which Grinrod claimed a right to be indemnified by Gray as is more fully set out in the judgment.

The action came on for trial before Ferguson, J., at Hamilton, on October, 27th, 1887.

Parkes, for the plaintiff.

McCarthy, Q.C., for the defendant Gray.

Lynch-Staunton, for the defendant Grinrod.

At the opening of the case *McCarthy*, Q.C., for the defendant Gray, took objection to the mode of proceeding as is further explained in the judgment, citing Marg. Rule 107; *Treleven v. Bray*, 1 Ch. D. 176; O. J. A. 1881, sec. 16, subsec. 4; *The Corporation of the Town of Dundas v. Gilmour*, 2 O. R. 463; and *Bagot v. Easton*, 11 Ch. D. 392.

The learned Judge, however, determined to proceed with the trial.

The following cases were cited on the argument: *Munro v. Watson*, 8 Gr. 60; *Canavan v. Meek*, 2 O. R. 636; *Re Cozier*, *Parker v. Glover*, 24 Gr. 537; *Thompson v. Wilkes*, 5 Gr. 594; *Campbell v. Robinson*, 27 Gr. 634; *Tweddell v. Tweddell*, 2 Bro. C. C. 152; *Waring v. Ward*, 7 Ves. 332; *Woods v. Huntingford*, 3 Ves. 128; *Parsons v. Freeman*, 2 P. Wms. 664, note.

November 11th, 1887. FERGUSON, J.—The action is upon a mortgage and brought by the plaintiff as mortgagee for the purpose of realizing upon his mortgage.

The defendant Grinrod is the mortgagor. The mortgage bears date August 23rd, 1882. On October 2nd, 1882, the defendant Grinrod, the mortgagor, by deed bearing that date, granted the lands to the defendant Gray subject to the mortgage. It was admitted that the defendant Gray afterwards granted the land, subject I apprehend as aforesaid, to a certain company called, I think, "The Waverley Knitting Company." This conveyance was made for the purpose of sustaining a certain action against the town of Dundas. It was not produced, its execution was however proved, and it was admitted that it had been lost. The plaintiff's action was dismissed as against the defendant Gray, as he had been made a party solely for the reason

that he was, by the plaintiff, supposed to be the owner of the equity of redemption in the lands, whereas, he was not such owner. This dismissal was, however, under all the circumstances, without costs. Counsel appeared for the company who had before signed and executed a disclaimer. They were made a party by consent.

Judgment was given for the plaintiff against the defendant Grinrod for the amount of the mortgage debt \$3568.60, and costs.

There was also judgment ordering a sale of the property with a reference to the Master at Hamilton.

The plaintiff did not ask any relief personally against any defendant except Grinrod his mortgagor.

The defendant Grinrod (the mortgagor) however claimed to be entitled as against the defendant Gray to indemnity against payment, or in respect of the mortgage debt. Each of these defendants had filed a statement of defence, and an order had been made by the local Judge for the trial of the matters of difference raised between them at the trial of the action. Objection was made to such a trial on the ground that the requirements of the provisions of the Judicature Act, applicable in such cases, had not been complied with, and that the defendant Gray was for this reason at a disadvantage, though his counsel admitted that he, the defendant Gray, had done all that he could, to bind himself to the position in which the case was at the trial. On this objection there was much argument, in which it was asserted that I had not jurisdiction to try these matters owing to the non-compliance with the provisions of the Act. I was of the opinion that the proceedings were not what they should have been, but as the parties interested seemed to have committed themselves to what had been done, as the order for the trial had been made, and as the witnesses were there at some expense, I concluded to proceed with the trial, which I did. The defendant Gray complained that he had not had an opportunity of pleading to the statements of the defendant Grinrod against him; and during the trial an order was made, allowing the defendant

Gray to amend his pleadings by setting up a counter-claim or set-off (or as he might see fit) against the defendant Grinrod.

The defendant Grinrod had had a commission executed—he himself residing in the State of Michigan—and by this and some other evidence, showed that the defendant Gray had had possession of and some profits from the place.

Counsel for defendant Grinrod relied upon the case of *Campbell v. Robinson*, 27 Gr. 634. In that case the learned Judge referred to and quoted the language of Lord Eldon in the case of *Waring v. Ward*, 7 Vesey, at p. 337; and the language of Lord St. Leonards in *Jones v. Kearney*, 1 D. & W. 155, as stating the law upon which he proceeded in giving that part of his judgment which is now material here.

In *Waring v. Ward*, Lord Eldon said: “The party meant at the time of the contract to buy the estate, subject to that mortgage, in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity, to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor’s transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage.”

In *Jones v. Kearney*, *supra*, Lord St. Leonards said: “If I create an incumbrance on my estate and sell, and no engagement be entered into with respect to that incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance.”

In *Campbell v. Robinson*, *supra*, the learned Judge said that the position of the vendor under such circumstances was that of a surety for the purchaser for the payment of

the debt; and further on, that it is the right of a surety upon the debt being in default, to call upon the party as to whom he stands in the relation of surety to pay the debt.

What is thus shown is a presumption—a supposed intention—an equity in favor of the vendor Grinrod and against the purchaser Gray; that is, if under the actual facts and circumstances they are to be considered as vendor and purchaser.

Before the making of the conveyance from Grinrod to Gray, Grinrod had been carrying on, or had been endeavouring to carrying on a business at Dundas, and Gray, who is called as a witness, says: "The conveyance was made for the purpose of protecting Grinrod and putting me in a better position. He was indebted to several creditors who were pressing him, and he said if he only had time he could get enough from friends on the other side to clear up his debts and enable him to go on with his business. Long, Bisbee, and Hunt were acting with me as friends of Grinrod. I was to hold the property until Grinrod paid what I had advanced and was advancing for him. The property was acquired for the purpose of carrying on the knitting business. Grinrod was carrying on this business before he purchased the property from Corby. He was the tenant of Corby. It was in that business that I was assisting him. * * He first went to Michigan in December, 1882. He went again in February, 1883. He went for the purpose of realizing on his property there, and coming back and carrying on the knitting business. He had tried to form a company in his interest, but did not succeed. After he went, the Waverley Knitting Company was formed in 1883. Grinrod did not come back and avail himself of the privileges of the company. * * I did not purchase the property for my own benefit, but as a security."

At this stage, Mr. Staunton objected to the evidence on the ground that the deed should speak for itself, and could alone be looked at. I ruled against the objection, and the

witness proceeded: "I did not purchase for the purpose of having the property for myself. I consulted Mr. Begg as to whether or not I should become liable for the amount of the mortgage, and he advised that I should not, as I had signed no documents. I furnished all the money for Grinrod to carry on the business, expecting to be relieved from week to week before he left. After he left the money came out of the stock or from the stockholders. * *"

Mr. Begg, who was the solicitor in the transaction between Gray and Grinrod, was called and confirmed what Gray said, so far as it related to him; and said further, that he understood from both parties that the object of the conveyance was to enable Gray to control the property temporarily. In cross-examination he said, that it was well understood that Gray was not to be liable upon the mortgage, that Grinrod deceived him (the witness) and Gray much in saying that he could get money on the other side to pay us what he owed us; and that he always understood that as soon as Gray got his money, he did not want the property any longer; and that he also understood that Grinrod was not to be away long.

Hunt says that Grinrod spoke to him of this deed, and said it was to keep creditors from "piling on" and selling him out, that he told him that he had \$20,000 worth of property in Michigan, and spoke as if he wanted to do what was right with all. The evidence of Gray is uncontradicted. It is supported by the evidence of the other witnesses called, so far as they had any knowledge of the transaction. The sum that it was contended was paid the mortgagee as interest on the mortgage, was paid by the son of Gray, and was money of the company and not of the defendant Gray.

I find upon the evidence given, that it was not the intention or the understanding of either the defendant Gray or the defendant Grinrod when the conveyance was made of the lands subject to the mortgage, that the defendant Gray should either pay the mortgage debt or indemnify Grinrod against payment of it; that the contrary of this was the

intention and understanding of both of them : that the conveyance was made for a temporary purpose, and not in fact as the consummation of an ordinary sale of the lands subject to the mortgage ; that Grinrod disappointed, I think deceived, Gray and others who were acting as his friends, in not procuring money out of the property he said he had in Michigan, and returning and paying his debts to them, and left Gray with the conveyance in his hands, but without payment of his claims against Grinrod, which were very considerable—said to be \$2,000 and over ; and that Gray thus having the conveyance, and being interested in the knitting company, for the purpose of assisting that company in an action against the town of Dundas, made a conveyance to them, which would not have been done at all, in all human probability, if Grinrod had performed his promises to Gray, or even had come back and made an effort to perform such promises.

As to the question of the admissibility of the parol evidence, I am of the opinion that it was properly admitted. It did not contradict, vary, or add to the contents of the deed or any of such contents. It was admissible for the purpose of *rebutting* the supposed intention, the presumption, the equity, on which Grinrod rests his case against ~~against~~ Gray. According to the view of Lord Eldon and that of Lord St. Leonard's above referred to, such is the character of Grinrod's ground of claim against Gray. Parol evidence could not have been given in support of or to strengthen the presumption or equity in the first place. It could, I think, be properly given to rebut it ; and when so given, parol evidence could be given in answer to it, which, however, was not done. To permit Grinrod to recover against Gray in respect of this supposed or alleged indemnity, would not only be, in my opinion, quite unjust, but entirely contrary to what was intended at the time the deed was made ; and I am of the opinion that any right that he would appear to have on looking at the deed, &c., is of a character to be rebutted, and has been fully rebutted by the parol evidence.

For the defendant Gray it was contended that even if he once had been liable to Grinrod, he ceased to be so liable when he made the conveyance to the company. In the view I have taken as to the other elements or part of the case, I think I need not dispose of this contention. I do not know whether or not the defendant Gray desires to pursue his remedy against Grinrod upon the amendment of his pleadings and have a reference to ascertain the amount of Grinrod's indebtedness to him. If he so desire, I apprehend he is entitled to such a reference. The judgment in respect of the claim made by Grinrod, is against him and in favour of the defendant Gray, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

EACRETT V. KENT.

Landlord and tenant—Bankruptcy and insolvency—Assignment under 48 Vic. ch. 26 (O.)—Distress for rent—Goods not in custodia legis.

The tenant of certain freehold premises executed an assignment under 48 Vic. ch. 26 (O.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment.

Held, that the landlord's right of distress was not affected by the assignment.

Held, also, that goods so assigned were not to be therefore deemed in *custodia legis*.

THIS was an action brought by the assignee for the benefit of creditors under 48 Vic. ch. 26 (O.), against the landlord of the assignor, praying a declaration that the landlord was not entitled after the assignment to distrain for arrears of rent upon goods of the assignor.

The action was tried at the last Autumn Assizes at London, before Rose, J., without a jury, when the learned Judge reserved the case, and subsequently delivered the following judgment:

November 16, 1887. ROSE, J.—The short question here for decision is, whether the Act respecting Assignments for the Benefit of Creditors takes away from a landlord the right of distress where the assignment is executed before the distress, but the distress is made before the sheriff takes possession under the assignment.

I have carefully perused the cases cited of *Mason v. Hamilton*, 22 C. P. 190, 411; *McEdwards v. McLean*, 43 U. C. R. 454; *In re McCracken*, 4 A. R. 486; *Wyld v. Clarkson*, 12 O. R. 589, and it seems to me that the weight of judicial opinion is in favour of the view that the landlord's lien is independent of the actual levy of a distress. 2nd. That the right of distress, or lien, cannot be taken away, except by express enactment.

The plaintiff here—the assignee—urges that under sec. 4, of ch. 26, 48 Vic. (O.), which declares that an assignment made in conformity to the requirements of such section, “shall vest in the assignee all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, belonging at the time of the assignment to the assignor,” saving certain exceptions, vested the property in question in the assignee, prior to the distress, for distribution among creditors, and so free from the landlord’s right of distress.

2. That immediately upon the assignment the goods were *in custodia legis*, and so freed from the liability to distress.

3. That section nine favored such a view, as it provided that “an assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment.”

It seems to me that what vested in the assignee by the assignment was the interest of the assignor at the time of the assignment, and that was an interest or property in the goods subject to the landlord’s lien.

If the assignee had entered into possession prior to the distress, then in accordance with the view of Moss, C. J. A., in *Re McCracken*, 4 A. R. 493, and the Chancellor in *Wyld v. Clarkson*, 12 O. R. 592, the goods might have been considered *in custodia legis*, and the landlord’s rights affected; but until the assignee took possession, the goods remaining in the possession of the assignor, the right of distress remained and might be exercised.

Unless I was prepared to hold that the bare assignment of the assignor’s interest in the personal property under the Act freed it from the landlord’s lien or right of distress, I would be unable to hold that he was not entitled to distrain while the goods remained in the possession of his tenant, the assignor.

If he had the right to distrain, it follows, as it seems to me, that the assignee had no right to take the goods out of his possession without satisfying the distress.

There must be judgment for the defendant for such sum as shall be found due by the Master for rent, it having been agreed at the hearing that such sum should be ascertained by reference. The reference will be to the Master at London.

The defendant must have his costs up to and, including the hearing, subsequent costs to be reserved until after the Master's report.

If the parties can agree upon the amount of rent, judgment may be entered upon such agreement evidenced to the Master by writing signed by the parties or their solicitors. In such event the defendant will have his costs of the defence without further order.

December 8, 1887. *Gibbons* moved to set aside this judgment and to enter judgment for the plaintiff on the law, evidence, and weight of evidence.

Aylesworth, shewed cause.

The cases and statutes cited are referred to in the judgments.

December 24, 1887. ARMOUR, C. J.—I agree with the result of this judgment of my brother Rose, and think that it ought to be affirmed.

There is nothing in the Act respecting assignments for the benefit of creditors, 48 Vic. ch. 26 (O.), or in the Acts amending it, 49 Vic. ch. 25, and 50 Vic. ch. 19 (O.), to prevent a landlord having the right to distrain from distraining goods on the demised premises, whether before or after an assignment has been made of them under the said Acts, or before or after the assignee has gone into possession of them under any such assignment.

Such goods cannot be said to be *in custodia legis* when in the possession of an assignee under any such assignment so as to prevent such distress, nor can they be said to be *in custodia legis* at all.

It is not necessary to determine what is the law with reference to such a distress since the coming into force of 50 Vic. ch. 23, sec. 2, sub-sec. 4, (O).

In my opinion the motion must be dismissed, with costs.

FALCONBRIDGE, J.—I also think that the judgment appealed from is correct. Goods in the possession of an assignee under 48 Vic. ch. 26 (O.), are in no sense in the custody of the law. In England goods seized by a mortgagor under a *fiat* in bankruptcy were held not to be so privileged: *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 9 M. & W. 434; *Phillips v. Spenville*, 6 Q. B. 944. Under the Insolvent Act of 1875, the official assignee was an officer of the Court, and special provision was made as to the preferential lien of the landlord.

The restriction of his preferential lien by 50 Vic. ch. 23, sec. 2, sub-sec. 4, is not applicable here, as the statute was not then in force; and that section seems to be a legislative declaration that at the time of its enactment the right of distress was unrestricted.

STREET, J.—I am also of opinion that the judgment complained of is right, and should be sustained, upon the short ground that the landlord had a right which has been called a preferential lien and has been held to be in the nature of a lien, being a right to distrain and hold the goods of his tenant as security for his over-due rent; that this right has not been taken away by any statute; and that the assignee, therefore, takes subject to this right, as well as to all other liens and charges upon the property of the assignor which are not taken away by statute: *McEdwards v. McLean*, 43 U. C. R. 454; *Re McCracken*, 4 A. R. 486.

There should be a reference to ascertain the amount of the rent due to the landlord, if the parties cannot agree upon it.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

RE BOYLAN AND THE CITY OF TORONTO.

*Municipal law—Intoxicating liquors—R. S. O. ch. 181, sec. 17—By-law—
Power to limit tavern licenses.*

- Held*, (1.) That the council of the corporation of the city of Toronto has the power under R. S. O. ch. 181 sec. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law (39 Vic. ch. 26 (O.)) granting limiting powers to the board of license commissioners.
2. That though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the council of the city and could have had no operation elsewhere than in the city, shewed that it must, by reasonable intendment, be held operative there.
3. That the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the Legislature to the city to pass the same.

O'Donohoe, Q. C., on November 29, 1887, moved absolute an order *nisi* to quash a by-law of the city of Toronto, on the grounds; (1) That the council of the corporation of the city of Toronto had no power to pass a by-law limiting the number of tavern licenses, because that power was transferred by law to and created in the Board of License Commissioners for that city: (2) that the by-law was bad on its face, because it contained no description of the local limits of its operation: and (3) that the by-law was bad, because it was unreasonable and aggressive, and in restraint of trade.

McWilliams shewed cause.

December 24, 1887. ARMOUR, C. J.—It is quite clear that the council of the corporation had the power to pass the by-law limiting the number of tavern licenses; that power is expressly given to them by R. S. O. ch. 181, sec. 17, and is not at all interfered with or diminished by the provisions of the law granting limiting powers to the Board of License Commissioners.

Those limiting powers were originally granted to both bodies by 39 Vic. ch. 26, secs. 2 and 4, (O.) and were intended

to co-exist in both bodies, the Council of the Corporation and the Board of License Commissioners; and under this statute *Brodie and the Corporation of Bowmanville*, 38 U. C. R. 580, was decided, which expressly determined that the first clause of the by-law in controversy in that case which limited the number of tavern licenses to be issued in the town of Bowmanville to five, was clearly within the power of the council of that town. The first objection, therefore, fails.

As to the second objection. The by-law was passed by the council of the city, and could have had no operation elsewhere than in the city, and must, by reasonable intendment therefore, be held operative in the city.

A by-law cannot be held to be unreasonable or oppressive, or in restraint of trade if the power to pass such a by-law is duly delegated to the body passing it by a Legislature having the authority to delegate such a power, and if the body passing the by-law has only done that which the delegating Legislature says expressly it may do.

The Legislature here has expressly given to the city council power to pass a by-law limiting the number of tavern licenses, and the city council has directly and exactly followed and exercised that power.

In my opinion the order *nisi* should be dismissed, with costs.

FALCONBRIDGE, J., concurred.

STREET, J., not having been present during the argument, took no part in the judgment.

Order nisi dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

DOBSON V. SOOTHERAN ET AL.

Landlord and tenant—Forfeiture of term by assignment—Overholding Tenant's Act—Notice.

S. and his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two quarters' rent were overdue and in arrear, made such an assignment to C., who thereupon took possession of the premises and shortly afterwards paid D. the two quarters' arrears of rent. A few weeks later D. served on S. and his partners a demand of possession and notice of application to the Judge under the Overholding Tenants Act, which S. handed to C., and C. appeared before the County Judge on the hearing of the application, and had himself added as a party to the proceedings.

On motion by C. in the High Court to set aside the proceedings,

Held, that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of the second section of the Overholding Tenants Act, and that C. having intervened in the proceedings could not object that no demand had been served on him.

Held, also, that the receipt after the forfeiture of the rent which had become due before the forfeiture did not operate as any waiver thereof, and that a sufficient demand in writing of possession had been made upon C. by the landlord:

On the 10th February, 1886, plaintiff, the landlord, leased to the defendants, the tenants, a shop in the town of Lindsay, for a term of five years from 1st March, 1886, at the yearly rent of \$500, payable quarterly in advance on 1st March, June, September, and December. The lease was made under the Act respecting Short Forms of Leases, and contained a covenant by the lessees not to assign or sublet, a proviso for re-entry by the landlord upon non-payment of rent or non-performance of covenants, and a provision that the lease should become forfeited and void in case the lessees should make any assignment for the benefit of their creditors. The lessees entered into possession under the lease, and continued to carry on their business upon the premises until the 26th September, 1887, when they made an assignment to one Cowan for the general benefit of their creditors, under which Cowan, a day or two afterwards, took possession of the premises,

employed the lessees as his clerks, and continued to sell goods for the purpose of winding up the estate.

At the time the assignment was made, the rent which had become due on the 1st June and 1st September, 1887, still remained unpaid. Early in October the landlord, who lived or carried on business within a few doors of the demised premises, asked Cowan to pay these arrears, and Cowan, about the 8th October, after consulting with the inspectors of the estate, paid them accordingly, nothing being said on either side as to any continuation of the holding by the assignee of the premises.

On the 14th November, 1887, a demand of possession and notice of application to the County Judge under the Overholding Tenants Act, addressed to the original lessees by name, was served upon them upon the premises, the ground alleged in the demand being that they had made an assignment for the benefit of their creditors. Cowan was not present when this demand was served, but it was handed to him a few minutes afterwards by one of the lessees, and he at once went to the lessor and asked permission to remain in possession of the premises until he had disposed of the stock, but the landlord positively refused to allow him to do so. Cowan thereupon appeared before the County Judge upon the hearing of the motion, and upon his own application was added as a party to the proceedings. He was then examined as a witness on his own behalf, and filed an affidavit setting forth in substance the above facts as to his possession of the premises, and his conversation with the landlord after seeing the demand of possession. He objected by his counsel that he had not been served with any demand of possession, and claimed to be entitled under the lease by virtue of the assignment made by the lessees.

The learned Judge of the County Court overruled his objections and ordered a writ to issue for the delivery of possession to the landlord. The proceedings were removed into this Court by *certiorari*, upon the application of Cowan, who then moved to set them aside under the seventh section of the Overholding Tenants Act.

On December 5, 1887, *Aylesworth* and *McIntyre* appeared in support of the motion, citing *Laxton v. Rosenberg*, 11 O. R. 199; *Baker v. Atkinson*, 11 O. R. 735; *Wyld v. Clarkson*, 12 O. R. 589; *Woodf.*, L. & T. 9 ed. 150; *Roberts v. Davey*, 4 B. & Ad. at p. 671, per Denman, J.; *Croft v. Lumley*, 5 E. & B. 648, 6 H. L. 672, 705, 706.

Hudspeth, Q.C., contra, contended there was a clear forfeiture, and that the relationship of landlord and tenant could not be restored.

December 13, 1887. STREET, J.—It was contended by counsel for Cowan upon the argument before us upon the authority of *Baker v. Atkinson*, 11 O. R. 735, and the cases there referred to, the Overholding Tenants Act, should not be held to apply to cases of forfeiture; but the words of the second section of that Act appear to me wide enough to extend to all such cases: the act of the lessees in making an assignment for the benefit of their creditors was in my opinion an act whereby their tenancy was determined within the meaning of that section as well as within the meaning of the provisions in their lease. The lease having become forfeited by the very act under which the assignee claims to be entitled to hold under it, I think he is to be treated as having been merely a tenant at sufferance, because the acceptance of the landlord of arrears of rent, accrued due before the forfeiture, can neither be treated as a waiver of the landlord's rights nor as evidence of the creation of any new term. Cowan never claimed to hold adversely to the landlord. The landlord appears to have been willing that he should remain in occupation of the property until he should desire to turn him out, and if Cowan had not appeared upon the motion before the County Judge I do not see how the proceedings against the tenant could have been of any effect, confined as they were to an application against persons not in possession of the property. Having been added as a party at his own request the assignee now objects before us that

the proceedings should be set aside, because no demand of possession was served upon him.

The objection is one which might have been entitled to more consideration had the proceedings been originally taken against him, and the objection then raised before the Judge; but after becoming distinctly aware of the object of the proceedings through the notice handed him by one of the tenants, and after being told by the landlord that he could not remain, he has chosen to be made a party, in order, no doubt, to obtain a decision upon the merits of his claim to be entitled to remain in possession: he cannot be taken to have intervened in proceedings which did not affect him, for the mere purpose of taking an objection so strictly technical, under the circumstances, as that here urged, and I think the learned Judge was right in dismissing it.

I am of the opinion that the motion should be dismissed, with costs.

ARMOUR, C. J.—I am of opinion that the case is one coming clearly under the true intent and meaning of the second section of the Act respecting overholding tenants, and that the defendants hold without colour of right against the right of the landlord: *Gilbert v. Doyle*, 24 C. P. 60; *Longhi v. Sanson*, 46 U. C. R. 446.

The receipt by the landlord of the rent which fell due before the forfeiture was incurred did not operate as a waiver of the forfeiture: *Marsh v. Curteys*, Cro. Eliz. 528; *Price v. Worwood*, 4 H. & N. 512.

The Act provides that service of all papers and proceedings thereunder shall be deemed to have been properly effected if made as required by law in respect of writs and other proceedings in actions of ejectment.

The demand in writing required by the second section of the Act was, therefore, well served upon the defendant Cowan, it having been delivered to the defendant Sootheran, and handed by him a few minutes afterwards to the defendant Cowan. It was not, however, addressed to the defen-

dant Cowan, but to the other defendants only, and demanded possession of them, and of all persons claiming under them, and the defendant Cowan was claiming under them. When therefore the defendant Cowan applied and was made a party to the proceedings, any objection to the demand on this account was put an end to.

This demand was in my opinion a sufficient election by the landlord to forfeit the term: *Wilkinson v. Colley*, 5 Burr. 2694.

The motion will be dismissed, with costs.

FALCONBRIDGE, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

O'CONNOR V. KENNEDY.

Husband and Wife—Marriage—Banns—License—Evidence—Bastardizing issue—26 Geo. II., ch. 33—C. S. U. C. ch. 102, sec. 103—37 Vic. ch. 6, sec. 1 (O.)—Legal presumption in favour of marriage.

In ejectment it appeared that M., one of the defendants, was married to N., 7th February, 1866, on one calling of banns, a dispensation having been procured from the Roman Catholic Archbishop for the other two calls, both parties belonging to that faith. The husband had immediate and continued possession of the land in question under deed to him. Of this marriage was born, 20th February, 1867, an only daughter. N. died 3rd May, 1868, and his widow M., on 11th October, 1870, intermarried with the defendant, K., and they continued in uninterrupted possession until the issue of the writ herein. On 11th January, 1886, the daughter of M. & N. intermarried with the plaintiff, to whom was born, in wedlock, 3rd July, 1886, though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff and his infant daughter against M. and her husband, the defendant K., they claimed title by possession and denied the validity of the marriage between M. and N., on the ground of the non-publication of banns, *Held* (1) That the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II., ch. 33, was in force in Canada as to publication of banns. (3) That 37 Vic. ch. 6, sec. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favour of marriage.

Per ARMOUR, C. J.—Full effect is given to the proviso of sec. 1 of 37 Vic. ch. 6 (O.) by reading it as limited to preserving the invalidity of a marriage illegally solemnized, when either of the parties to such illegal marriage, has since, during the life of the other, contracted marriage according to law.

Ejectment tried before O'Connor, J., at the last Spring Assizes, at Lindsay, when the following facts appeared :

Margaret Walsh, (one of the defendants) was married to John Nary, on 7th February, 1866, on one calling of banns, a dispensation having been procured from the Archbishop for the other two calls, all the parties being Catholics.

John Nary had immediate and continued possession of the premises until his death.

On 20th February, 1867, was born to them a daughter, Ann Nary. John Nary died on the 3rd May, 1868. His widow, Margaret, on 11th October, 1870, married the defendant Donald Kennedy. They continued in uninterrupted possession down to the issue of the writ herein.

On 11th January, 1886, Ann Nary (sole issue of John Nary) married the plaintiff, Dennis O'Connor, whose sole issue was a daughter, the infant plaintiff, Mary Ann O'Connor, conceived before marriage, but born in wedlock, on 3rd July, 1886. Ann O'Connor (née Nary) died 4th July, 1886.

The defendants, Donald Kennedy and Margaret Kennedy, set up title by possession, and denied the validity of the marriage between Margaret Kennedy and John Nary on the ground of non-publication of banns.

The learned Judge found in favour of the plaintiff, and entered judgment accordingly.

November 30, 1887. *MacLennan*, Q. C., and *Kean*, moved to enter judgment for the defendants, on the grounds that the plaintiff failed to establish that the title to the lands was vested in John Nary; or the legality of the marriage of John Nary and Margaret Walsh, whose illegality and nullity the defendants had established; or the legitimacy of Annie Nary, whose illegitimacy the defendants had established; or the marriage of Annie and Dennis O'Connor; or the legitimacy and parentage of the plaintiff, Mary Ann O'Connor; and on the ground that the defendants, or some or one of them, were or was entitled to a verdict under the Statute of Limitations.

Lennox and *McCosh*, shewed cause.

The cases and statutes cited, are referred to in the judgment of Armour, C. J.

December 24, 1887. ARMOUR, C. J.—The question whether the Imperial Act for the better punishing clandestine marriages, 26 Geo. II., ch. 33, was brought into force in this Province, either in whole or in part by the Act 32 Geo. III., ch. 1, providing that, in all matters of controversy relative to property and civil rights, resort shall be had to the laws of England, as the rule for the decision of the same; and by the Act 40 Geo. III. ch. 1,

providing that the criminal law of England as it stood on the 17th of September, 1792, shall be the criminal law of this Province, has been discussed in several cases in the Courts in this Province without having ever been definitely settled.

In *Regina v. Secker*, 14 U. C. R. 604, the suggestion was made whether "the English Marriage Act, (26 Geo. II. ch. 33,) was, in all or any of its provisions, in force in this Province, either under our general adoption of the criminal law of England, or in consequence of the apparent recognition of that statute by our Legislature as having force in Upper Canada."

In *Regina v. Bell*, 15 U. C. R. 287, the suggestion was again made whether that Act was "to any extent in force in this Province;" but it was found unnecessary to determine whether the 11th or 12th clauses, upon which only any question could have arisen in that case, formed part of the law of this Province.

In *Regina v. Roblin*, 21 U. C. R. 352, the subject was again discussed, and it was considered by the Court that that Act was adopted, "so far as it consisted with our civil institutions being part of the law of England at that time, relating to civil rights, that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband or wife, or as lawful issue of a marriage alleged to have been solemnized in Upper Canada." But it was also considered that whether the 11th clause of that Act was ever part of the law of this Province, might fairly be questioned, and the Court said: "We shall, perhaps, if we find it necessary in any case to determine the point, find it right to determine that neither of these clauses (11th and 12th) could be taken to form part of our law of marriage under our own adoption of the law of England by 32 Geo. III. ch. 1."

And in *Hodgins v. McNeil*, 9 Gr. 305, that Act was said to be generally in force in this Province under the Constitutional Act.

The Legislature of this Province has repeatedly recognized that Act as being in force in this Province by from

time to time passing laws modifying and qualifying its provisions. See 33 Geo. III. ch. 5 ; 38 Geo. III. ch. 4 ; 2 Geo. IV. ch. 11 ; 11 Geo. IV. ch. 36.

Having regard to the provisions of the Acts 32 Geo. III. ch. 1, and 40 Geo. III. ch. 1, to the cases above referred to, and to the recognition thereof by the Legislature of this Province, as above mentioned, I am clearly of opinion that the Act 26 Geo. II., ch. 33, was brought into force in this Province by the Acts 32 Geo. III. ch. 1, and 40 Geo. III. ch. 1, so far as its provisions were applicable to the circumstances of this Province, and were not inconsistent with the civil institutions thereof ; and that at all events (which is all that I am concerned with in this case) the provision thereof, making all marriages which should be solemnized without publication of banns or license of marriage from a person, or persons having authority to grant the same first had and obtained, null and void to all intents and purposes whatsoever, was brought into force.

Unless this provision was so brought into force in this Province, there is no provision in this Province making void a marriage so solemnized, and the fact that the Legislature of this Province has never deemed it necessary to make any such provision is cogent evidence that it considered it unnecessary to do so, because this provision of 26 Geo. II. ch. 33, was treated by it as being in force in this Province.

The provision of the law as to the publication of banns in force in this Province at the time of the questioned marriage, was Con. Stat. U. C. ch. 72, sec. 2, and this provision having been shewn not to have been complied with, owing to the impudent assumption of an ecclesiastic that he had power to dispense with such compliance, such marriage (unless the person solemnizing it was duly authorized by license to solemnize it) was null and void to all intents and purposes whatsoever.

The questioned marriage was, however, legalized by 37 Vic. ch. 6, sec. 1 (O.), unless the last proviso to that section prevented its being so legalized, which proviso is as follows :

“And provided, further, that nothing in this Act contained shall be extended, or construed to extend to make valid any marriage illegally solemnized where the parties to such illegal marriage, or either of them, has since contracted matrimony according to law.”

It was contended by counsel for defendants that this case came within the very words of the proviso, that this was a case where a marriage had been illegally solemnized, and where one of the parties to it had since contracted marriage according to law.

The section to which this is a proviso, is a remedial one, and for the public good, and should receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of its object; and I do not think that the proviso ought to be so read as to limit as much as possible the operation of the section, but ought to be so read as to limit as little as possible the beneficial operation of the section.

Full effect can be given to the proviso by reading it as limited to preserving the invalidity of a marriage illegally solemnized, where either of the parties to such illegal marriage has since, during the life of the other, contracted matrimony according to law.’ That this was the only effect the Legislature intended it should have, is beyond doubt, and I am of opinion that it ought to be so read.

The Imperial Act, 3 Geo. IV. ch. 75, legalized certain marriages, and provided that nothing therein contained should render valid any marriage where either of the parties should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person, and this is just what our Legislature intended by the proviso under consideration. See proviso to 11 Geo. IV. ch. 36, sec. 2, and 24 Vic. ch. 46, sec. 2.

The onus of establishing that the questioned marriage was void in law lay upon the defendants, and this they, in my opinion, failed to establish; for although the person who solemnized the marriage was called as a witness, he was never asked whether he had a license to solemnize it;

nor throughout the entire evidence was any one asked if there was such a license, nor was the word license named.

In the absence of some proof negating the existence of such a license I do not think that the presumption of a legal marriage was rebutted.

This presumption is not the same as the presumption raised with regard to other facts, but is much stronger: the evidence for the purpose of repelling it "must be strong, distinct, satisfactory, and conclusive." "A presumption of this sort in favour of a marriage can only be negated by disproving every reasonable possibility:" *Piers v. Piers*, 2 H. L. Cas. 331; *De Thoren v. Attorney General*, 1 App. Cas. 686; *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*, 6 App. Cas. 364.

In my opinion the motion must be dismissed, with costs.

FALCONBRIDGE, J.—I, too, am of opinion that the remedial and curative effect of 37 Vic. ch. 6, sec. 1, (O.) (re-enacted almost *totidem verbis* by 38 Vic. ch. 8, sec. 6, (O.)) should not be impaired by holding that one of the parties to the supposed illegal marriage could, after the death of the other, bastardize his or her own issue by contracting matrimony. Counsel for the defendant ingeniously contended that the object of the Legislature was to prevent the addition of spurious or questionable heirs-at-law to those whom he styled the legitimate heirs, viz., the issue of the second marriage.

If this had been the object and intent of the enactment, I apprehend that apt words referring to the birth of issue by the subsequent marriage would have been used.

I agree that the intention was to prevent a prosecution for bigamy.

As this point is decisive of the case, the appeal should be dismissed.

STREET, J., not having been present during the argument, took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

GORDON V. THE CITY OF BELLEVILLE.

Municipal Corporation—Ice on side-walk—Negligence—Knowledge—Contributory Negligence.

The plaintiff, while walking home at night, as he was accustomed to, along the side-walk provided by the defendants for foot passengers, and which the defendants were bound by statute to keep in proper repair, but along the centre of which a ridge of ice had accumulated, and been allowed by them to the knowledge of the plaintiff, to remain in that condition for a couple of months, slipped across the ridge and fell, injuring himself. While stating that he was walking carefully, he admitted that he was aware that it was a dangerous place, and might have been avoided, either by his taking to the travelled road, or by going home another, but longer, way. Numbers of people were in the habit of using it daily without accident. The Judge at the trial declined to withdraw the case from the jury.

Held, that the plaintiff, having the right to use the side-walk, it was a question for the jury whether under the circumstances of the case he was exercising such care as a prudent person would reasonably exercise in using it, knowing its condition.

Knowledge is not *per se* contributory negligence.

The plaintiff, a resident of Belleville, sued the defendants for their breach of duty, in not keeping one of their sidewalks in repair, by reason of which, while walking thereon, he slipped, fell, and was injured.

The defendants, among other defences, set up that the plaintiff's injury was occasioned "from contributory negligence on the part of the plaintiff, as he, the plaintiff, by the exercise of ordinary and reasonable care and diligence, might have avoided the consequences of the alleged negligence of the defendants."

It was clearly proved that the defendants were negligently guilty of a breach of their duty, and the defence was rested wholly on the ground of contributory negligence, and it was contended that the knowledge of the plaintiff, when he used the sidewalk, of its condition, established contributory negligence in him to such an extent that the case ought to have been withdrawn from the jury and the action dismissed.

The evidence of the plaintiff given at the trial, which took place before O'Connor, J., and a jury, was to the effect following:

He was walking along a sidewalk in the city of Belleville, provided by the defendants for the use of foot passengers, late one moonlight night in winter, on his way home. The sidewalk was covered with ice or snow, and had a ridge of ice along the centre of it sloping to each side of the walk, the result of dripping water from an overhanging roof, in which condition it had been to the knowledge of the plaintiff for a couple of months, and he stated that he had considered it dangerous all that time. The path was very slippery, and the plaintiff who stated he was walking carefully, slipped on the ridge and fell across it, injuring himself. The sidewalk might have been avoided by the plaintiff taking to the middle of the road traversed by vehicles, or he might have gone home by another block, but in going as he did he took the path he was accustomed to take. Numbers of people were in the habit of using the path daily in safety: one witness, however, stated in cross-examination that he generally avoided the place as dangerous, and took the road.

The jury found in favour of the plaintiff, and judgment was entered for him accordingly.

December 16, 1887.—*Osler*, Q. C., and *Dickson*, Q. C. moved absolute and supported an order *nisi* to set aside the verdict and judgment, and enter the same for the defendants, or for a new trial, on the grounds that the plaintiff was guilty of contributory negligence: that the damages were excessive; and on the law, evidence, and weight of evidence.

Burdett, shewed cause.

December 24, 1887. ARMOUR, C. J.—Upon the facts, as given in evidence, we are asked to hold that the plaintiff was admittedly guilty of such contributory negligence as disentitled him to recover against the defendants for their negligent breach of duty, and that the case ought not to have been submitted to the jury, but that the learned

Judge ought to have dealt with it himself by dismissing the action.

To this I cannot agree. The question was, in my opinion, one, under the circumstances of this case, which could not have been withdrawn from the jury, but must have been left to them to determine whether the plaintiff with the knowledge he had of the condition of the sidewalk, was using it with that care which a prudent man with such knowledge ought reasonably to exercise in using it. The question how far knowledge of the neglect of duty causing the injury is contributory negligence, has been much discussed in the Courts in the United States with varying results in the various States; but the general result seems to be that knowledge is not *per se* contributory negligence.

We were much pressed in argument, in a similar case this sittings, with the decision of the case of the *City of Erie v. Magill*, 101 Penn. State Reps. 616, in which it was held that a foot passenger on the sidewalk of a city street, who, with full knowledge of the dangerous character of an obstruction on the pavement, deliberately attempts to walk over it when he could have avoided it by a slight detour into the street, and who falls and is injured in such attempt, is guilty of contributory negligence *per se*. But I am not aware, nor was it pointed out in argument, what, if any, was the local law in that State as to the duty of a city to keep its streets in repair.

If the local law there is the same as here, I say that this decision does not commend itself to my reason, for the sidewalk is built for and specially assigned for the use of foot passengers; and if a foot passenger knows that the sidewalk is out of repair, and goes into that part of the street specially assigned to vehicles, and is there run down and injured, or sustains an injury from that part of the street not being in sufficient repair *quoad* foot passengers, it may, with equal justice, be set up in an action brought by him for such injury, that he was guilty of contributory negligence in going upon that part of the

street specially assigned to vehicles instead of going upon that part of the street specially assigned to foot passengers ; and it may be that it would have required far less care on his part to have escaped injury if he had continued on the sidewalk than it would have required to have escaped injury going as he did upon that part of the street specially assigned to vehicles. The foot passenger was entitled to use the sidewalk, and the city was bound to keep it in repair, and I do not agree that the city could excuse itself from the consequences of its negligent breach of duty by telling the foot passenger that he ought to have walked somewhere else ; or that the Court could determine as a matter of law that it was the duty of a person, acting as a prudent person would have done, to have done so, and that doing so he would have met with no injury.

The law here provides that every public road, street, bridge, and highway, shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall be civilly responsible for all damages sustained by any person by reason of such default.

I do not think that we ought to enable corporations to evade their plain duty by reading into this enactment a proviso that they are not to be civilly responsible to any person who uses such road, street, bridge, and highway, knowing that they have neglected their duty, and have not kept them in repair. It would lead to this absurdity that the more the corporation neglected its duty, the more the road was out of repair, and the longer it continued so, the more it would become known and the greater would become the number of those requiring to use it who would know its condition, and the fewer would become the number of those requiring to use it who would not know its condition, and so the more it was out of repair and the longer it continued so, and the greater the neglect of the corporation, the less would be its responsibility, for it would be to fewer people.

The public have the right to use every public road, street, bridge, and highway whether in or out of repair

and it is the duty of the corporation to keep them in repair.

Every person is entitled to use them, assuming that the corporation has performed its duty, and has kept them in repair, and the care he will be required to exercise will be commensurate with that assumption. If, however, he knows that they are not in repair, he will still be entitled to use them, but the care he will be required to exercise must be commensurate with his knowledge of their condition; he will be required to exercise such care as a prudent man would reasonably exercise in using them knowing their condition.

In the case in hand, the plaintiff was entitled to use the sidewalk, although he knew its condition, but in so using it, he was bound to use such care as a prudent person would reasonably exercise in using it knowing its condition.

There was evidence that he did use such care that could not be withdrawn from the jury, and I think the learned Judge would have erred if he had done so.

I refer to *Clayards v. Dethick*, 12 Q. B. 439; *Smith on Negligence*, App. B.; *Maw v. King*, 8 A. R. 248; *Walton v. York*, 6 A. R. 181; *Weblin v. Ballard*, 17 Q. B. D. 122; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Baddeley v. Earl Granville*, 19 Q. B. D. 423; *Yarmouth v. France*, 4 Times L. R. 1, 19 Q. B. D. 647.

In my opinion the order *nisi* must be discharged, with costs.

FALCONBRIDGE, J., not having been present during the argument, took no part in the judgment.

STREET, J.—I concur in the opinion that the verdict in this case should be allowed to stand, and that the defendants have nothing to complain of either in the fact that the question of their liability was not withdrawn from the jury, or in the manner in which it was submitted.

In order that the plaintiff should be held to have been guilty of contributory negligence, it seems necessary that real negligence of some sort should be brought home to him, and his right to damages should not be taken away from him by the result of something done by him which was not negligence in the ordinary acceptation of the term.

The plaintiff's evidence here is, that he was walking along the footpath provided by the defendants for the use of foot passengers, and which they were bound by statute to keep in proper repair: that a ridge of ice had accumulated and been allowed by the defendants to remain for weeks in the centre of the path, the result of the dripping of water from the eaves of an overhanging roof: that he was well aware that it was a dangerous place, by which I understand him to mean that there was danger of his slipping down upon it if he attempted to cross it, but that numbers of people were in the habit of crossing it daily without accident: that using every care, he attempted to walk across it and fell in doing so, sustaining the injuries of which he complains.

I do not see, upon this statement of facts, how the question could have been withdrawn from the jury and a nonsuit ordered.

No doubt the plaintiff's knowledge that the place in question was one upon crossing which it would be necessary that he should use more care than would be necessary in places where no danger of falling existed, imposed upon him the obligation of using, in crossing it, an amount of care corresponding with the danger of which he was aware; but it is equally plain that the question as to whether or not the proper degree of care was in fact used, was a question which the plaintiff was entitled to have submitted to the jury.

The defendants' answer to this is, that the plaintiff, knowing the place to be dangerous, should have avoided it by going off the part of the street provided by the defendants for foot passengers, and into that part provided by

them for horses and carriages. But this principle, if applied at all, must be taken to be of general application, and as compelling foot passengers in the crowded streets of a city, in all cases of similar neglect by corporations, to incur one kind of danger in order to avoid another. I think that the plaintiff, not being forbidden in any way by the defendants to walk upon the place in question, and seeing it in daily use by foot passengers, was entitled to treat it as a place upon which he was invited to walk, and upon which he could walk with reasonable safety, upon the condition of taking reasonable precautions; and that, therefore, no duty was cast upon him to walk elsewhere.

I am of opinion that the motion should be dismissed, with costs.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

DAVIES V. THE CITY OF TORONTO ET AL.

Municipal corporation — Municipal powers — Submission to electors of matters over which, without assent of electors, municipal council has jurisdiction — Injunction to restrain such submission.

The defendants' council passed through two readings by-laws for the limitation of the number of tavern and shop licenses, under R. S. O. ch. 181, secs. 17 and 24. Before the third reading the council passed a resolution authorizing the submission to the electors, contemporaneously with the general municipal elections, of the question whether such limitation was desirable or not, reserving, however, to the council, the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of \$300 out of municipal funds in advertising the vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other ratepayers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an interim injunction was moved for to restrain the defendants from submitting the question to the electors and from printing ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions.

Held, 1. That in so far as the application depended upon the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial.

2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction should not be restrained, there being no express legislative prohibition, and the council having acted *bonâ fide*, unless some good reason were shown for the conclusion that the result would be injurious or unjust to the corporation or some of its members, which was not shown in this case.

Semble, That if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law to the vote of the electors would have been illegal and *ultra vires*, and would have been restrained.

Helm v. Port Hope, 22 Gr. 273, distinguished.

December 24, 1887. This was a motion for an interim injunction restraining the defendants, the corporation, from submitting certain by-laws to the vote of the electors of the city of Toronto.

The grounds of the motion, together with the facts, and arguments of counsel, are set out in the judgment.

McCarthy, Q. C., Osler, Q. C., and W. M. Douglas, for the motion.

Foster, Q.C., McWilliams, and Shepley, contra.

December 27, 1887. STREET, J.—The plaintiff in this action is a ratepayer of the city of Toronto, who sues as well on behalf of himself as of all other ratepayers, except the individual defendants: and the defendants are the Corporation of the City of Toronto, and James B. Boustead, Robert J. Fleming and George E. Gillespie, the last three named defendants being a sub-committee of the executive committee of the city council.

The plaintiff moves upon notice to the defendants, for an interim injunction restraining the defendants, the corporation, their servants and agents, from submitting to the vote of the electors of the city of Toronto, certain by-laws relating to the number of tavern and shop licenses to be issued in the city of Toronto for the year beginning 1st May, 1888, and from expending any of the money of the city in the submission of the question to the electors and restraining all the defendants from printing or publishing the said by-laws, and from printing any voting or ballot papers.

The grounds set forth in the notice of motion are, (1) that there is no power in the defendants, the corporation, to submit the said by-laws to the vote of the electors, as the questions involved are entirely for the determination of the council; (2) that the expense incurred and to be incurred in reference to the said by-laws is unauthorized and illegal, and (3) that the taking of the proposed vote will tend to prejudice the vote to be taken on the question of increased license duties, and on other grounds disclosed in the plaintiff's affidavit.

The proposed by-laws are referred to as exhibits to the plaintiff's affidavit. They are two in number. The first clause of the first of them provides that the duty to be paid for tavern licenses to be issued for the year beginning 1st May, 1888, shall be \$200, in addition to the sum of \$150

or \$200, as the case may be, payable under the provisions of sec. 1 of 49 Vic. ch. 39 (O.) The second clause provides that the number of tavern licenses to be issued for the year beginning 1st May, shall not exceed 100.

The other by-law proposes to enact, by its first clause, that the duty to be paid for shop licenses, to be issued for the year beginning 1st May, 1888, shall be \$200, in addition to the sum of \$150, payable under the provisions of sec. 1 of 49 Vic. ch. 39 (O.); and by its second clause, that the number of shop licenses to be issued for the year, beginning 1st May, 1888, shall not exceed 20.

These two by-laws, in the shape of bills, were introduced into the council on 3rd November, 1887, and were then read a first and second time, and reported by the council in committee of the whole, without amendment. Upon the question that they should be read a third time, it was resolved: "That prior to the third reading of the bills to provide for a reduction of the number of tavern and shop licenses for the year 1888, the same be published and submitted to a vote of the electors entitled to vote at the municipal elections, such vote to be by ballot, and taken at the same time as the next municipal elections."

On the 5th December, 1887, the executive committee of the council reported to the council: "Your committee have had under consideration the matter of promulgating the question to be submitted to the rate-payers at the January elections for a further reduction of liquor licenses, and recommend that public attention be drawn to the matter through all the daily papers, the cost of advertising not to exceed \$300. It is further recommended, that the chairman of your committee, and aldermen Fleming and Gillespie, be a committee to superintend the publication and see that the expenditure is kept within the appropriation," and this report was adopted by the council.

On the 14th December, 1887, all the Toronto daily newspapers contained advertisements comprising a copy of each of the proposed by-laws, and a notice that all municipal electors were entitled to vote upon them. These advertise-

ments were all published at the expense of the corporation, as was also a further notice published on Monday, the 19th December, stating shortly the effect of the proposed by-laws, that all municipal electors were entitled to vote upon them, and that the vote would be taken on the 2nd January, 1888, at the same time and place as the municipal elections.

A set of ballot papers for each by-law in a different colour has been prepared and is produced: a marginal note to each ballot paper limits the question submitted, to the portion of the by-law which relates to the reduction in the number of licenses to be issued, and the question submitted by each ballot paper is "For the reduction" or "Against the reduction."

The plaintiff, after setting forth in his affidavit the documents and facts above stated, swears that he is advised and believes that the proposed submission and vote are wholly improper and illegal, and ought to be restrained, and (paragraph 16) that he believes "it will be prejudicial to the vote intended to be taken on the question of the increase of license fees to submit at the same time the question of the reduction of the number of licenses." With regard to this latter statement, it was stated by counsel at the argument, and not denied, that the scale of duty imposed by the first clause of each of the proposed by-laws made no alteration in the amount to be paid during the present year. It was argued for the plaintiff that the scale fixed the duties at a sum greater than that at which it could by law be fixed by the council without a submission of the question of the amount of the duty to the rate payers; but I do not understand that it is proposed to take any vote at the ensuing elections upon the question as to the amount of the duty to be imposed, the ballot papers being plainly confined to the question as to the number of licenses to be issued, and it seems unnecessary that I should express an opinion upon this particular point.

The affidavit of the defendant, Fleming, filed in answer to the application, so far as he is concerned, states that for

some time past many of the citizens and ratepayers of Toronto have been publicly and privately urging upon the council, and the members composing it, the desirability of passing by-laws under the powers conferred upon it by the Liquor License Act, limiting and reducing the number of tavern and shop licenses to be issued for the coming year, and the matter has become one of much public interest, many ratepayers being anxious for the passage of such a by-law and many others being opposed to it: that, speaking for himself, and expressing as he believes the views of a majority of the council, the resolution to submit the question of reduction to the electors was passed in the utmost good faith and with the sole *bond fide* desire of ascertaining what view the majority of the ratepayers of the city hold upon the question: that the resolution was carried unanimously at the meeting of the council at which it was submitted, though, as he believes, several of the members present were opposed to the principle of the reduction, as all felt that they would be in a much better position to deal with the by-law in such a way as to meet the wishes of a majority of the ratepayers after the taking of the proposed vote: that he verily believes it is highly expedient, and in the interest of the city, that a public expression of the public will upon the principle of the by-law should be obtained: that in no other way than the taking of a vote of the ratepayers can the fact as to the side upon which the balance of public opinion amongst the ratepayers lies, be so satisfactorily ascertained: that the expense incurred is small: that no question of an increase in the license duties is now pending before the council, and that the whole action of the council on the matter has been perfectly *bond fide* and straightforward, and without any ulterior or improper motive, and there is no desire or intention on the part of the council to prejudice the plaintiff or any one else. He also states that a somewhat similar question was submitted to the electors in 1884 by the council without opposition, and that the expense was found trifling.

It appears from the examination of others of the city officials that the greater part of the expense necessary to carry out the resolution of 3rd November, 1887, had been incurred before any notice of this motion was given, and that an injunction granted now would be too late to stop the expenditure of the funds of the city in connection with the vote proposed to be taken. I think, therefore, that so far as the application for an interim injunction depends upon that ground it should not be granted, but that the plaintiff should be left to obtain such order with regard to the repayment to the city, by the other defendants, as he may appear entitled to at the hearing of the action.

This leaves the application resting upon what I think is the true and substantial point intended to be raised, which, shortly stated, comes down to this — the city council before coming to a conclusion upon an important question, the decision of which the law has left entirely in their hands, desire to obtain from the ratepayers an expression of their opinion which is not required by law, and in order to do so in the most effectual manner, propose making use of the forms and machinery provided by the Municipal Act for obtaining the expression of the opinion of the ratepayers in cases where that expression of opinion is required by law to be given; and the question now to be determined is, whether they should be restrained from doing so, it being admitted on the part of the defendants that there is nothing in the Municipal Act which authorizes the submission to the electors of the questions now proposed to be submitted.

It was powerfully urged by counsel for the plaintiff that the action of the council is *ultra vires* and illegal, because the vote to be taken will practically settle, by the direct voice of the people, a question, the decision of which the law gives not to them, but to the council elected by them: that the safeguards which are provided by the Municipal Act for the scrutiny of the claims of persons alleging themselves to be entitled to vote, and for the prevention of corrupt practices, will be entirely wanting upon the taking

of the proposed vote, because the occasion is one outside the provisions of that or any other Act: that even if the council are to be allowed to adopt the provisions of the Municipal Act by way of analogy, they have not done so to the proper extent by giving the notices which are prescribed in cognate cases coming within the Act; and the case of *Helm v. The Corporation of the Town of Port Hope*, 22 Gr. 273, is referred to as containing expressions strongly supporting the plaintiff's position.

No imputation has been made, in either the affidavits or arguments used on behalf of the plaintiff, upon the motives actuating the council in deciding to take the proposed vote: the resolution to take it appears to have been a unanimous one, concurred in by all the members present, irrespective of their individual views upon the questions proposed to be submitted; and I must, I think, assume that, so far as possible under the circumstances, the vote will be fairly taken.

It is not sufficient to entitle the plaintiff to the interference of the Court by injunction that he should shew merely that the proposed vote is not authorized by the statute governing the corporation; there being no express prohibition of such a course, he must go on to shew some good reason for the conclusion that its adoption is likely to produce some injury or injustice, either to the corporation or some of its members.

Were it now proposed to give to the result of the proposed vote a final and binding effect, there could be no doubt as to the duty of the Court to restrain it, because the attempt then would be to substitute the direct decision of the electors for that of the council to which the law has referred it, and which every person concerned is entitled to have. Such an attempt would be clearly illegal and beyond the powers of the corporation; but the council here expressly reserves to itself its proper function of finally deciding upon the propriety of passing the by-laws in question, and seeks to obtain the views of the electors as an aid only to its own ultimate decision.

The result of the vote, if taken, will be a powerful element, no doubt, in forming the ultimate decision of the council; but it would not be fair to assume that it will exclude all other considerations, and if the vote be taken in such a manner as to form a true index to the opinion of the electors, it would be an element most proper to be considered by the council, and one which they might wisely and fairly take into account. If, on the other hand, it is likely that a perverted view of public opinion upon the question will be presented as the result of the effort to obtain a true one, the effort should not be permitted.

The vote upon the questions in dispute is intended to be taken upon the same day as that fixed for the election of the mayor and aldermen for the ensuing year: the same deputy returning officers are to preside: the same ballot boxes are to be used, and the electors entitled to vote for the mayor and aldermen are those who are invited to vote upon these questions. The scrutiny into the rights of persons presenting themselves as entitled to vote is likely to be at least as close and thorough as that which generally takes place when a by-law is legally submitted to the people, and, unless I am to assume that the vote will be taken with utter disregard to good faith, I think the result must be that a far more accurate idea will be obtained of the real state of public feeling than could be obtained by a canvass, however careful, or from the resolutions of public meetings, however unanimous. The extent to which notice of the proposed vote should have been given was settled by a committee of the council without opposition, and it is not alleged by the plaintiff in his affidavit that the notice given is insufficient. The affidavit of the defendant, Fleming, on the other hand shews that the matter has been one upon which public and private discussion has for some time taken place, and I cannot hold that the injunction must be granted merely because notice was not given in the city of Toronto at a date earlier than the 14th December of a vote to be taken there on the 2nd January following.

In *Helm v. Port Hope*, 22 Gr. 273, the only case cited

from our own Reports, and from which the frame of the present action has been apparently taken, certain rate-payers of Port Hope asked for an injunction to restrain the corporation from submitting to the whole body of municipal electors a by-law authorizing the incurring of a debt for an illegal purpose, the intention of the council being to use the authority so obtained from the electors in support of an application to parliament for a bill legalizing the by-law. The electors there invited to vote included a class of persons *not entitled by law to vote* upon questions involving an increase in the pecuniary burthens of the municipality; and the late Chief Justice, then Chancellor, Spragge, by whom the judgment was delivered, calls attention to the danger of the proposed vote being put forward as the expressed will of the rate-payers *entitled to vote* upon the question involved, and expresses his opinion that it was a proper inference from what was before him, that it would be so put forward, and that the use of the machinery provided by the Municipal Act, was to be regarded as only part of a scheme to effect that object. The case is distinguishable, upon these grounds, from the present application, and although much that is said in the course of the judgment, is in terms applicable to the facts of the present case, it must all be read in connection with the facts and decision of that particular case, the proposed vote in which is there spoken of as "a proceeding unconscientious in itself and calculated to prejudice the plaintiff." At the conclusion of his judgment, the learned Chancellor thus guards himself against an extension of his judgment to a case like the present: referring to the machinery provided by law for submitting such questions to vote, he says: "I do not mean that a piece of machinery provided by the Legislature for one purpose may not properly be applied to another purpose, if done *bonâ fide*; but the fault of this proceeding is, that it is done in such a way as to give to it a character and effect calculated to operate to the prejudice of the plaintiff."

I have come to the conclusion, upon the whole matter, that the vote proposed to be taken is proposed by the council to the electors with the *bond fide* object of obtaining a fair expression of their views upon the important questions to which it relates: that in view of the time and manner of submitting it, the objections raised to it are more imaginary than real, and that no class of the ratepayers can be prejudiced by its submission.

I must therefore refuse to grant the injunction asked for.

As the plaintiff is still entitled to have a decision upon the question as to whether the funds of the city could properly be devoted to the purpose of taking such a vote, the costs of the motion will be reserved until the trial.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

RE OSTROM V. CORPORATION OF THE TOWNSHIP OF SIDNEY.

Municipal corporation—By-law to open road—Private interests—Consent of County Council—Statutory notices.

The municipal council of the township of Sydney passed By-law No. 279, to open a road east and west across four farm lots in the first concession of the township. A travelled road was already open from Belleville westward to the east end of the road to be opened under the by-law, at which point a side road ran north and south through the township. After crossing three lots, the proposed new road would intersect another north and south side road and, crossing this side road, it would extend westward across one more lot as a *cul-de-sac*. The applicant contended that this by-law was passed, not in the public interest, but to serve the private convenience of two land-owners of the locality. It was, in answer, sworn by the members of the township council that they intended to complete the road as soon as possible across five more lots to the westward, till it would reach the next north and south side road through the township.

This explanation was accepted by the Court as answering any apparent presumption that the by-law was not passed in the public interest, as in this case none of the other circumstances were present which in other cases have led to the belief that private interests only were being considered in passing the by-law.

The proposed road was to be only forty feet in width. The authority of the county council in this behalf was not obtained till after the by-law had been passed, and this application to quash it made.

Held, that the consent of the county council, though a condition precedent to the laying out of the road, was not a condition precedent to the passing of the by-law.

The statutory notices of the proposed by-law described the road as intended to cross not only the four lots mentioned in the by-law, but also the five others next west of them.

Held, following *Baker and Saltfleet*, 31 U. C. R. 386, that this variance was not fatal to the by-law.

An application to quash a by-law opening and establishing a road.

December 23, 1887. *Aylesworth* and *Wallbridge*, for the motion.

Clement and *Flint*, contra.

The facts and authorities are set out in the judgment.

January 3, 1888. STREET, J.—This is an application by Isaac Brock Ostrom, a freeholder of the township of Sidney, to quash by-law No. 297, passed by the municipal council

of that township, to open and establish a road across the ends of lots 23, 25, 26, and 27, in the first concession.

The concessions in Sidney number northward from the Bay of Quinte, the lots from west to east. There is a small gore upon the bay at the rear of each lot in the first concession, divided from the first concession by a travelled road running in a direction generally parallel to the waters edge, and a short distance from it. The original road allowance between the first and second concessions is about two miles from the bay, and runs from east to west of the township; but from lot 24 to lot 30, it is almost entirely occupied by the track of the Grand Trunk Railway, which strikes this allowance for road on the north some little distance to the east of lot 30, and crossing it at a very acute angle does not become clear of the south side of the allowance for some little distance to the west of lot 24. From the east limit of lot 27 to the east limit of the township there is a travelled road which follows the original allowance between the first and second concessions west from the east line of the township until it strikes the railway track, and it then diverges into the Dockstader road which runs along the south side of the railway track across lots 28, 29, and 30, and has been acquired by the township, apparently, from the persons through whose lands it runs. The road sought to be established by the by-law in question would form a continuation of this road along and adjoining the south side of the railway track as far as the east limit of lot 23. Belleville, which is the market town of the farmers in this locality, lies some distance to the east of the township of Sidney, and near the continuation of the line between the first and second concessions of that township. There is a travelled side road between lots 18 and 19, extending northward from the road between the first concession and the Gore to the allowance for road between the first and second concessions, which it strikes after crossing the railway; and which from thence, at all events, as far west as Sidney Station is a travelled road. The dwellings of

the owners of the lots in the first concession, appear to have been placed, almost without exception, upon the rear ends of their lots; that is to say, upon the ends which front upon the road between the first concession and the Gore. There is a side road between lots 24 and 25 extending north from this Gore road to the railway where there is a crossing, whence it then turns to the west along a short piece of travelled road adjoining the railway on the north side, and joins a side road running to the north between lots 24 and 25, in the second concession. It is plain that a road running west from the Dockstader road to the side road between 18 and 19, in the first concession, would be a public convenience, as it would in fact shorten by some two and a half miles the distance to Belleville, and replace the portion of the original allowance for road between the first and second concessions, which the railway has rendered useless, and this is admitted by all the parties; but the applicant and those supporting him say that the proposed by-law, stopping short as it does at the east line of lot 23, is not in the public interest, but in the private interest of two persons, and especially of Mr. Robert Graham, who owns the north-half of lot 23, who has at present no outlet excepting through the lands of the owner of the south-half of the same lot, and to whom, alone, the portion of the proposed road which lies to the west of the side road between lots 24 and 25 can be of any use. As may be expected, Mr. Robert Graham appears to have been one of the principal movers in getting up the petition pointing out to the council the advantages to the public of the proposed road. That petition, however, was for a by-law establishing a road as far west as lot 18, and was very numerously signed. When it came before the council they seem to have taken much pains to ascertain the desirability of the road asked for, and whether it should run on the north or the south side of the railway, and to have finally resolved that it was desirable in the public interest to build it, but that at present the state of the finances of the township would

not enable them to establish the whole road, but only that portion covered by the by-law which they have passed. The portion of that by-law which gives some ground for the suspicion that it was passed not entirely in the public interest, but to remove the private grievance of Mr. Robert Graham, is that part of it which extends the road across the side line between lots 24 and 25 until it touches his lands, thus giving him a public road as an outlet at the expense of the township, because that portion of the road certainly appears at present to benefit no one but him. It is sworn in answer to this that the council are fully determined to complete the road westward as soon as possible, but that from the east limit of lot 23, which is Mr. Graham's lot, it is as yet undecided whether it shall be continued on the north or the south side of the railway track, because from that point westward a considerable portion of the original allowance for road remains, to the north of the track, available for use by the township, and it is a question whether this should be utilized or the new road continued on the south side of the track.

I do not think that this is an unreasonable explanation of a circumstance which certainly at first sight struck me as a somewhat suspicious one, and I accept it, as well as the sworn statement of the belief of the deputy reeve and other members of the council, that the road, of which that part described in the by-law is only a part, will be completed as soon as circumstances will permit, as doing away with any presumption that the by-law has not been passed in the public interest. There are none of the other circumstances here which in other cases have induced the Court to come to the conclusion that private and not public interests had induced councils to open the roads then in question: See *Vashon v. East Hawkesbury*, 30 C. P. 194; *Peck v. Galt*, 46 U. C. R. 211; *Re Morton and St. Thomas*, 6 A. R. 323; *Pells v. Boswell*, 8 O. R. 680.

It was further contended, as a circumstance shewing an absence of good faith on the part of the council, that the placing of the road on the south side of the railway would

involve the expenditure of a much larger sum of money in making a good road than the placing of it on the north side would have done ; but the council seem to have had estimates made of the comparative cost of the two locations, and to have decided in favor of the south side, and I cannot, upon the conflicting affidavits before me, say that they are so clearly wrong in their conclusion as to justify me in treating their decision as one not fairly arrived at ; on the contrary, I should think that the balance of convenience to the public inclines in favor of the south line, because there is already a travelled road north of the railway running from the west as far east as lot 31, through the middle of the second concession. There is the further reason for my refusing to interfere, upon this ground, that when it was proposed that the new road should run as far west as lot 18, nearly all of those who now say that the road should run on the north side of the railway petitioned the council that it should be made upon the south side.

It is further objected that the proposed road is intended to be only 40 feet in width, and that the by-law in question fixing this width was passed without the previous authority of the County Council. Section 545 of the Municipal Act of 1883, upon which this objection is based, does not make the consent of the County Council a condition precedent to the passing of the by-law, but to the laying out of the road. In the present case the consent of the County Council has been obtained at the first and only meeting of that body held since the passing of the by-law. The laying out of the road, which I take to mean in this section either the actual work on the ground, or the laying of it out upon a plan for registration, may well be proceeded with after the passing of the by-law, and could not well be done in most cases until the passing of the by-law under which the laying out of the road is authorized. The width of 40 feet authorized by the by-law is the width of the Dockstader Road, and of the side roads with which the proposed road is to be connected.

The petition under which the by-law was passed asked for a road from lot 18 to lot 28, and the statutory notices followed the petition. The by-law provides for a road only from lot 23 to lot 28, and this variance is pointed out as a fatal objection to the validity of the by-law ; but this objection seems to be covered and overruled by the decision in *Baker and Saltfleet*, 31 U. C. R. 386, at p. 395.

The statutory notices were posted up on the 29th July, 1887; the by-law was passed on the 29th August, 1887. It was objected that this notice was not the full month's notice required by sub-sec. 1 of sec. 546 of the Municipal Act, 1883, and the notice certainly seems insufficient under the statute : see *LaPlante v Peterborough*, 5 O. R. 634; but having come to the conclusion that the other objections to the by-law are not well-founded, I do not think I should merely upon this ground quash a by-law which is good upon its face.

I therefore direct that the order *nisi* be discharged, with costs.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. CLARK.

Canada Temperance Act—Insufficient proof of prior offences—Police Magistrate—Separate commission for county and town—Jurisdiction—Adjournment.

The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against said Act, and that this was the third offence. The certificate produced to prove the prior convictions simply stated that Elias Clark was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act.

Held, that there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed.

Semble, that if the conviction were well drawn the similarity of name of the person mentioned in the certificate and the defendant would afford proof of identity.

The magistrate had a commission as a police magistrate for the county of Halton and an independent and subsequent commission for the town of Oakville; and he took the information and part of the evidence at Georgetown, and then adjourned to Oakville and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction.

Held, following *Regina v. Riley*, 12 P. R., 98, that the magistrate had jurisdiction to sit in Oakville under his commission as police magistrate for the county, and he consequently had jurisdiction to adjourn as he did.

THIS was a motion to quash a conviction under the Canada Temperance Act.

The grounds argued were:

1. That the evidence did not disclose that the prior convictions were against the second part of the Act, but merely against the Act.

2. That there was no evidence of prior convictions, the certificate of the Justice not being evidence, and the identity of the accused with the person named in the conviction was not established.

3. That the magistrate having a commission as Police Magistrate for the county of Halton, and an independent and subsequent commission for the town of Oakville, and having taken the information and heard part of the evi-

dence at Georgetown, in the said county, and then adjourned to Oakville, and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction, the conviction was invalid, as he had no jurisdiction to make the adjournments.

4. That the magistrate had no power to convict the accused of prior offences in his absence.

W. M. Douglas, for the motion,
Delamere, contra.

January 5, 1888. ROSE, J.—Having regard to the provisions of sec. 117 of the Act, I think the first objection is entitled to prevail.

The conviction on its face does not shew for what offence the first and second convictions were had, and when I look at the evidence I find a certificate stating merely that Clark was “convicted for a first offence against the provisions of the Canada Temperance Act 1878,” and similar language as to the second conviction—not stating the nature of the offence, or whether against the first or second part of the Act.

There are many offences for which the Act provides punishment, and I cannot say of which of these the accused has been convicted, and there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and I cannot say either from the conviction or evidence that there have been.

As to the second objection, I think the similarity of name afforded evidence of identity. See *Hamber v. Roberts*, 7 C. B. 861; *Simpson v. Dismore*, 9 M. & W. 47; and I should be inclined to hold a certificate sufficient, if well drawn.

I think the result of my opinion in *Regina v. Riley*, 12 P. R. at p 98, is against the third objection, and that the magistrate had the power to adjourn as he did. I think without and notwithstanding the second commission he had jurisdiction to sit in Oakville under his commission as Police Magistrate for the county, and in this I agree with

the dissentient judgment of the present Chief Justice of the Queen's Bench Division in *Regina v. Young*, 13 O. R. 198. The cases of *Rex v. Stevens*, Caldecott's Reps. p. 302, and *The Queen v. Beckey* and others, Weekly Notes of December 7, 1877, p. 244, may be referred to.

I also think the fourth objection not well taken, as the magistrate had power upon due proof of service to proceed in the absence of the accused, so far as possible, as if he were present; and as in his absence he could not be asked to plead, I do not see why he could not proceed without plea. See secs. 39-49, ch. 178 R. S. C. If this were not so, the absence of the accused would, in every case, prevent a conviction.

I could support the conviction against all the objections except the first. The form used is similar to several that lately have come before me, and should be altered.

The motion must be allowed, without costs; and the usual order for protection granted.

Conviction quashed, without costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. LANGFORD.

Justice of the Peace—Assault—Want of evidence—Interested Justice.

The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one Spragge, gone to the complainant's house, at the hour of about 10 o'clock p.m., and Spragge had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning.

Held, that there was no evidence of an assault, and the conviction must be quashed.

Held, also, that it was improper for the justice to sit and try the case, the complainant being his daughter; and that this was a good ground for quashing the conviction.

Motion to quash a conviction under the circumstances set out in the judgment.

W. M. Douglas, for the motion.

A. Cassels, contra.

January 6, 1888. ROSE, J.—The magistrate is the father of the complainant and convicted the accused of an assault, and on an information in the following words, "That Caleb Langford, did on the evening of the 2nd day of June last, after 10 o'clock, enter inside of my garden gate with Aaron Spragge, of Colpoys Bay, and rapped at the door, and when asked what they wanted Aaron Spragge said they had come, he wanted to introduce Mr. Langford, of Wiarton. I ordered them away or I would have them arrested: they knew my husband was away at the time." The informant was one Sarah Kalbfleish, a married woman.

From the evidence it appears that she told them, "you have come here to-night to insult me, I will have you both arrested in the morning."

On this evidence Langford was fined \$10 and costs, for that he did "unlawfully assault one Sarah Kalbfleish."

The accused claims that the magistrate refused a request for an adjournment to enable him to procure witnesses and

counsel. The magistrate says this request was not made until after the evidence for the prosecution had been given.

The summons was served at 8 o'clock in the forenoon, returnable at 2 o'clock in the afternoon.

Several affidavits were filed in behalf of the magistrate which state that the request for the adjournment was not made until after judgment. The same deponents say, as also does the magistrate, that upon being asked by the magistrate—after the evidence for the prosecution had been given—if he had anything to say, or if he had any witnesses, the accused answered in the negative.

It was not attempted to support the conviction. The applicant asked for costs on the ground of bias on the part of the magistrate.

Certainly he should not have sat. It was highly improper; no objection was raised. The applicant says that he did not know of the relationship at the time. If the conviction had been good otherwise, I would have been compelled to quash it on this ground.

The absurd decision arrived at points to the magistrate's mind having been affected by his relationship, and when a summons was served at 8 a.m., returnable in about six hours, the very greatest care should have been taken to grant an adjournment, if any ground was shewn for the request for one.

I am not at all convinced that any *bond fide* application for an adjournment was made to enable the accused to procure witnesses. He does not in his affidavits now contradict the statements made by the complainant, and his conduct unexplained, especially when he files affidavits after he has been made aware of the construction placed upon his actions, lays him open to imputation of motives not to his credit.

Moreover, so far as I can judge, all the evidence which was of moment, was before the magistrate. If there was other evidence, the material before me does not suggest it.

If, as apparently the complainant and the magistrate believed, the accused went to the complainant's house for

an improper purpose, he deserves no sympathy, and he does not choose to explain why he did go there.

Although one cannot but regret the want of learning and propriety of feeling which permitted the magistrate to sit in a case where his daughter was the complainant, or convict of an assault where none was committed, yet it is not to be wondered at that he did think that what he believed was meant as an improper proposal to a woman was punishable. He will probably remember for the future that mere words do not constitute an assault.

Had the accused been able to explain his conduct, or had objection been taken to the magistrate sitting, and he had insisted on acting notwithstanding such refusal, I should have visited him with costs.

Although he has acted unwisely, I am not able to say he has acted in bad faith. I attribute his improprieties to gross ignorance, rather than to any intentional violation of known laws. I do not therefore inflict upon him the penalty of costs.

The applicant will be in a position to have returned to him the moneys he has paid to the magistrate, but he must pay his own costs of this application.

The following cases as to bias may be found referred to, viz: *In the matter of the Mayor of Taunton*, the Times Law Reports, vol. IV. pp. 43, 87. In *Regina v. Rand*, L. R. 1 Q. B. p. 233, Lord Blackburn said: "Wherever there is a real likelihood that the Judge would from *kindred* or any other cause have a bias in favour of one of the parties, it would be very wrong for him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere."

The case of *Regina v. Meyer*, 1 Q. B. D. 173, was one where the Court dealt very severely with the magistrate. He there took no part in the conviction, merely sitting on the Bench; and after the other Justices had unanimously resolved to convict, he recommended a mitigation of the penalties, and his recommendation was acted upon, and yet he was ordered to pay the costs of the motion

for *certiorari*, because he, as a member of the Local Board of Health—prosecuting—was a party litigant.

There, however, his sitting was objected to, and although he did not act he remained on the Bench.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

IN RE CARPENTER ET AL. AND THE CORPORATION OF THE
TOWNSHIP OF BARTON ET AL.

Municipal Corporations—By-laws opening roads—Free roads—Rights of owners of toll roads—Joint management between municipalities—By-law creating “future indefinite contingent liability”—ultra vires—Conditional by-law—Invalidity.

A by-law was passed by the city of Hamilton on the 10th January, 1887, granting \$5,000 towards the construction of a free road leading into Hamilton from the east, to be paid when and so soon as the sum of \$3,500 should have been contributed by the corporation of the township of Barton, or any other municipality and private subscribers, and actually expended on the work of construction of the said roads, or on the purchase of the right of way therefor. The payment was also made conditional on the construction of the roads in manner, and on the terms, and subject to the conditions as in the by-law contained.

Among other conditions was one that no moneys should be paid until the council of the township of Barton should have passed a by-law for the assumption of the said roads, and the proper maintenance thereof by the said township, and until an agreement should have been entered into between the corporation of the said township, and the corporation of the city of Hamilton, providing for the maintenance of the said roads in a proper state of repair, and as free roads for all time to come; and it was further provided that before any moneys were paid the city was to be satisfied that the eastern free road should provide connection with the present system of township roads to secure *free travel* from the top of the mountain, &c.

No date was fixed for doing the work, or paying the money, and no provision was made for levying the amount during the municipal year, nor was the by-law submitted to the vote of the people.

Held, that the by-law created a future indefinite and contingent liability, and if such a by-law was valid at all it ought to have been submitted to the vote of the ratepayers.

The city derived income from certain sources independent of taxes, but this income with the taxes levied left a deficiency which had been met by borrowing money, which was still unpaid, and no appropriation had been made for the payment of the \$5,000.

Held, that this did not validate the by-law without submission to the people.

Resolutions and a by-law of the township of Barton dependent upon the Hamilton by-law, *held* invalid as being part of an invalid arrangement attempted to be made under sec. 555 of the Municipal Act of 1883.

Held, also, that the arrangement, if valid on other grounds, and one for their joint benefit, might be entered into under sec. 555 by the municipalities.

Held, lastly, that a by-law passed to open a free road, solely for the purpose of enabling the public to avoid travelling upon a toll road, and thus avoid the payment of tolls, the 'free road' not being otherwise required for the public convenience—could not be supported, and the by-laws and resolutions were quashed.

Motion by Albert E. Carpenter and Robert R. Gage to quash two by-laws of the City of Hamilton, and the township of Barton, respectively, under the circumstances stated in the judgment, where the arguments of counsel and cases cited also appear.

September 9th and 10th, 1887.

Robinson, Q.C. and *Jeffs*, for the applicants.

MacKelcan, Q.C., for the city of Hamilton.

Moss, Q.C. and *Bell*, for the township of Barton.

December 29, 1887. ROSE, J.—So far as material for the disposition of this case, in the view I have taken of the law, the facts may be stated as follows :

Some of the inhabitants of the county of Wentworth have for some years past been desirous of having what have been called "free roads"; that is, roads leading into the city of Hamilton, which may be travelled free from the payment of tolls.

Certain steps were taken in 1886 and 1887 by the above named corporations to accomplish that purpose.

The applicant, Carpenter, is the proprietor of the King street toll road, and the principal shareholder in the Barton Road Company, which owns the "Main street toll road." These roads lie under the mountain and lead from the east, and are the only roads affording ingress from that direction.

The steps taken have been in the alleged interest of the public, and in apparent disregard of and contrary to the financial interest of the proprietors of the toll roads.

On the 18th of January, 1886, a resolution was passed by the council of the township of Barton with a view to the opening up of a road lying between the toll roads and the mountain, which would enable the public, or a certain portion thereof, to enter Hamilton from the east at a point about fifteen chains north of Main]street; I take this measurement from one of the plans filed.

The resolution was as follows :

Moved by Mr. Gage, seconded by Mr. Cline, that in the opinion of this Council it is desirable that a road be opened along the base of the mountain, commencing where the line between lots 3 and 4 intersects the allowance for road between the 3rd and 4th concessions ; to run westerly across lots 4, 5, and 6, connect with Mountain Avenue on lot 7 ; and whereas a very largely signed petition of the rate-payers of this township has this day been presented to us for that purpose :

Therefore, be it resolved that this Council hereby agrees and bind themselves to assist and aid the opening of said road by granting such sum or sums as in the opinion of this Council may be deemed judicious and wise in the general interests of this township, on the following conditions, that is to say : That the corporation of the city of Hamilton grant a sum sufficient to defray all expenses connected with securing "right of way," grading and fencing that part of the proposed road across said lot 4, in lieu of the road allowances at present occupied by them as a site for the reservoir ; and all further expenses over and above the said grants necessary for the opening up of said road across lots 5 and 6, be provided for by the petitioners.

And, in the event of the estimated cost of the proposed road being provided for as above, that this Council will use the powers in them vested for the purpose of opening up the said road asked for by the petitioners.

That the undermentioned members of this Council be appointed to act with a number of the petitioners as a deputation to wait on the Finance Committee of the city of Hamilton, at an early date, to ascertain their views in the premises : T. Lawry, J. W. Gage, J. W. Flewelling.—Carried.

On the 18th of October following it was further resolved "that the sum of \$500 be granted toward the opening of the proposed new road across lots five and six in the 3rd concession of this township, in accordance with the resolution passed by this council at their first meeting held on the 18th of January last, 1886; provided, however, that a sufficient sum be paid to the treasurer of this township to defray all expenses in expropriating the land required for said road, and grade and ditch and fence the same before a by-law is passed to open the road"

On the 10th of January, 1887, the city of Hamilton passed by-law No. 359, reciting:

1. The power to make an arrangement with Barton township council under sub-sec. 2 of sec. 533 of the Municipal Institutions Act of 1883.

2. That it was in the interest of the city, "that free roads leading into the city of Hamilton should be established in order so far as possible to overcome the disadvantages arising from the toll system under which the existing roads are held and managed."

3. That many citizens of Hamilton, and others, had undertaken, by way of private subscription, to aid in the construction of free roads leading into the city, and specifying the roads in question.

4. That Barton township council had agreed to make a grant in aid of the construction of the said roads.

5. That the city council had been petitioned to grant \$5,000 towards the construction of the roads; and enacting—

1. That "when and so soon as the sum of \$3,500 shall have been contributed by the council of the township of Barton or any other township municipalities and private subscribers, and actually expended on the work of construction of the said roads, or on the purchase of the right of way therefor, the sum of \$5,000 shall be paid by the corporation of the city of Hamilton towards the construction and completion of said roads, in manner and on the terms and subject to the provisions and conditions hereinafter contained."

2. That a joint committee shall be appointed, &c.

3. That all moneys paid out under this by-law shall be paid on the report of a sub-committee.

4. That the \$5000 shall be paid from time to time, as the work of construction progresses.

5. That no moneys shall be paid hereunder until the council of the municipality of Barton shall have passed a by-law for the assumption of the said roads, and the proper maintenance thereof by the said municipality, and until an agreement shall have been entered into between the corporation of the municipality and the corporation of the city of Hamilton, providing for the maintenance of the said roads in a proper state of repair, and as free roads for all time to come.

6. Proviso that before any moneys are paid the city must be satisfied that the eastern free road, hereinbefore referred to will provide connection with the present system of township roads to secure free travel from the top of the mountain, etc.

On the 2nd of May, 1887, the council of the municipality Barton passed by-law 246, reciting that "it is expedient, as appears from a petition of a large number of ratepayers of the municipality of Barton, to open a road through lots Nos. 4, 5, and 6, in the 3rd concession of the municipality of Barton," and enacting that a road be opened and established, describing the eastern road complained of.

The petition referred to has a formal printed heading and merely requests the council to open out the road, but states no grounds upon which it is based. I do not at present stay to examine the resolutions and the Hamilton by-law, to see whether any arrangement is thereby evidenced. On the 8th of June the county council were asked to vote \$1,000 to aid the project, but the motion was lost.

Mr. Gage who made the motion, and who appears to have taken a very active interest in promoting the scheme, is reported to have said, "That the free roads would be of great value to the county of Wentworth generally. To commence with, the present toll roads Main, King and

Barton streets would be depreciated in value fully \$15,000, and this for the outlay to the county of \$1,000. As the county would eventually buy the toll roads this reduction in value would benefit the county to the extent of the difference between the two sums."

It is to the credit of the council that a motion based upon such an argument was voted down. It does not need comment to point out its manifest unfairness; one might hope the speaker was misreported.

If the owners of the toll roads have a right, under the laws, to collect tolls, out of which they are required to maintain the roads in a good state of repair, such rights must be respected and supported, and it would not be becoming that the council which might desire to purchase the roads should first lessen their value by, for such purpose merely, establishing free roads to take away the traffic and lessen the income.

If the public desire free roads let the existing rights and franchises be fairly dealt with by purchase, and not by any questionable means.

I find as a fact, on this evidence, that the arrangement entered into between the city of Hamilton and the township of Barton (if as a matter of fact they have agreed upon anything) was for the purpose of establishing free roads into the city, along which the public might travel, avoiding the established toll roads; and that there was no other interest or influence moving the councils thereto, and that no public interest or convenience influenced the councils in passing the motions or by-laws above referred to, unless the establishing of free roads be in the public interest.

The council of the city of Hamilton candidly state their ground of action, and the council of Barton state no reason for passing a by-law, save expediency; and when different members of the council on affidavit before me say that in supporting the by-law they acted in good faith, and as they believed in the interest of the ratepayers of said township, their motive being to serve the public and no other, I must in the light of the surrounding facts take them to

mean that they deemed it to be in the public interest to establish free roads.

When some of the deponents say that the new road from the east will give a shorter road by which to enter the city, the statement may be literally true if the persons entering the city desire to go to a point north of King or Main streets, for, as I have pointed out, the point of entrance is about fifteen chains north of Main street, less than 1000 feet. I do not, however, believe that the new road was suggested or the by-laws passed for the convenience of the public in saving them whatever distance might be saved in entering at the terminus of the proposed route, but I find that the sole motive was to enable the public to avoid the toll roads and the payment of tolls.

I do not believe that such a scheme, plan or arrangement is good in law. It seems to me that when a toll road is established and the right given to collect tolls, with the obligation to keep in repair, that it would be unfair, unjust and illegal to establish a road running alongside and affording the public equal facilities, *solely* for the purpose of enabling the public to avoid the payment of tolls, and that any by-law passed in furtherance of such a scheme would be unsupportable, if attacked by either the proprietor of the toll road, or any person whose property it was intended to expropriate for the purpose of constructing the new road.

I am prepared, if necessary, to quash the by-law on such grounds.

No doubt, if public convenience requires a new road to be opened, it may be, although the result would be to diminish the increase of the toll road. *Angell* on Highways, pp. 88 to 105, and cases there referred to, although not strictly in point, are of interest as to this ground of objection. But I think the by-law invalid on other grounds.

Sub-sec. 2 of sec. 555 of the Municipal Act of 1883, is as follows: "The council of every township, municipality city, town, or incorporated village, may pass by-laws for entering into and performing any arrangement with any other council, in the same county or united counties, for

executing at their joint expense, and for their joint benefit any work within the jurisdiction of the council."

Some discussion took place as to the meaning of the words "within the jurisdiction of the council." Whatever may be their exact meaning, it seems to me that the work thus to be executed must be within the jurisdiction of at least the council of the municipality within which the work is to be done; as, in this case, Barton; and I am further of the opinion that the work must be such as would be within the jurisdiction of each council; that is, it must not be of a character manifestly *ultra vires* any municipal council, because it is a joint arrangement, each council being a party thereto, and each must have power to enter into it.

The work in question is, the constructing or making a road. Such work would be within the jurisdiction of a municipal council. It would be clearly within the jurisdiction of the council of the municipality within which the road lies, therefore it seems to me, apart from other questions, Hamilton had the power under the section to enter into an arrangement with Barton township to construct a road at their joint expense, if for their joint benefit.

It was argued that sub-sec. 2 of sec. 555 did not apply to roads, as sec. 554 was specific in its terms, and evidently was passed to enable a council to give such aid as was here promised; and that if so, sec. 554 did not apply, as this road was not one "passing from or through" Barton.

I have looked at the history of the legislation.

I find in 1866, sec. 555 was enacted as sec. 337 of ch. 51, the caption being "Aiding Counties in making Roads and Bridges."

In 1873 sec. 554 appears as sec. 429 of ch. 148, and is with sec. 555, as sec. 430, placed, under the caption "Aiding in making Roads and Bridges."

In the R. S. O. ch. 174, the sections are 513 and 514; 513 headed, "Aiding in making roads and bridges," and 514, under the general "Division III., Powers of the cities, towns, and villages in relation to roads and bridges," which headings remain in 1883.

I have looked carefully at these headings in view of *Wood v. Hurl*, 28 Gr. 147, cited by Mr. Robinson, as to the effect of headings in the interpretation of statutes.

I think, moreover, sec. 554 may have been considered necessary, as a council might desire to aid an adjoining municipality in making roads, &c., which were not to be made at their joint expense or for their joint benefit. I do not, therefore, consider whether a road lying wholly within Barton can be said to be one "passing from or through" Barton, as if this road would be for the joint benefit of the two municipalities, I think it a work for executing which at their joint expense they might enter into and perform an arrangement.

Mr. Robinson, however, attacked the Hamilton by-law as *ultra vires* the council, creating, as he contended, a "future indefinite contingent liability" and not having been referred to the rate-payers. He formulated the rule governing municipal councils as follows: "Pay as you go, or obtain the consent of the rate-payers." Indeed, he pressed his argument further, and said that he doubted the power of the council to pass such a by-law, even with the assent of the ratepayers.

It is not necessary to consider the last proposition, as I am entirely with him as to the first.

The by-law, if valid, creates a liability for which money must be raised, if certain conditions are complied with, and certain events happen. When the money may be needed, does not appear. No provision was made for payment in 1887, as appears from the account of estimated receipts and expenditures put in.

Mr. MacKelcan argued that it would not be necessary to levy a tax to raise the money, as the city had an annual income independent of the taxes. So it appears; but it also appears that in 1886 the excess of expenditure over income from all sources was \$43,400; and it further appears from the affidavit of Mr. Jeffs that from information derived from the city clerk, although the revenue of the city has not been specially pledged or appropriated for any particular debt or liability of the corporation, the said

revenue has been appropriated for the expenses of the current financial year (1887), and, that such revenue has always been estimated as part of the funds available to meet the necessary expenditure each year before striking the yearly rate ; and, further, that the city has continually obtained advances from the banks, and that in 1886 the banks advanced over \$71,000, which remains unpaid; and a sum of \$71,600 appears in the estimates as appropriated this year from taxes to be levied in 1888.

It is manifest, if next year \$5,000 are withdrawn from income derived otherwise than from the taxes levied, the levy of taxes must be increased by so much ; and so it seems to me that the case comes within the spirit, if not the letter, of sec. 346, which enacts that "every by-law except for drainage, as provided for under sec. 570 of this Act, or for a work payable entirely by local assessment for raising upon the credit of the municipality any money not required for its ordinary expenditure, and not payable within the same municipal year, shall, before the final passing thereof, receive the assent of the electors," &c. It seems to me the words "raising upon the credit" are equivalent to incurring a debt or liability, and that the section means that, save as excepted, the credit of the municipality shall not be pledged save with the consent of the electors.

In the case of *Edinburgh Life Assurance Co. v. St. Catharines*, 10 Gr. p. 388, Spragge, V. C., said, "I incline to think Mr. Cameron's construction of sec. 224 correct, and that any appropriation of money for other than ordinary purposes, whether payable within the year or not, and any appropriation for any purpose not payable within the year, requires the express sanction of the ratepayers." Sec. 224 corresponds with sec. 346, save that certain exceptions have been introduced since sec. 224 was passed.

I put my finding as to this objection upon this ground, that the credit of the municipality has been pledged for the payment of \$5,000, at a time not fixed, not stated to fall within the year, and which in fact will not fall within the year ; and no provision has been made to pay the sum out of the income of the year.

Then, what is to be the nature of the arrangement which will secure the proposed road as a free road for all time to come? Within what time is this arrangement to be entered into? The work may not be commenced, or may drag on for an indefinite time before all the conditions are fully performed. What year is to bear the burden? Clearly the liability is "future, indefinite, and contingent;" and as clearly it is not provided for out of the income of 1887, or indeed out of 1888.

The following cases may be referred to, *In re Nichols and Alnwick*, 41 U. C. R. 577; *McMaster v. Newmarket*, 11 C. P. 398; *Clapp v. Thurlow*, 10 C. P. 533.

The case of *Hamilton v. Wentworth*, 34 U. C. R. p. 603, cited by Mr. MacKelcan, does not apply to the facts of this case.

Then, as to the resolution and the by-law of the municipality of Barton.

It seems to be clear that there is no intention on the part of the municipality to expropriate land and open up a road unless Hamilton is bound to contribute. The arrangement is one under sec. 555 to execute the work at their joint expense and for their joint benefit. I must treat it as one arrangement, and as the resolutions refer to the action of Hamilton, and the Barton by-law follows that of Hamilton, it must be held that the Barton by-law, conditional and relying upon the invalid Hamilton by-law, is affected with its invalidity.

Treating the arrangement as one, I think any one interested, or a resident of Barton, might well object to a by-law being passed as part of an arrangement which in itself is invalid.

I have no doubt the applicants have a status to move against the by-laws. I have stated the interest of Carpenter in the toll roads. He is moreover a resident of Hamilton, and Robert R. Gage is a resident of Barton.

The order *nisi* must be made absolute, with costs against the city of Hamilton and the township of Barton.

[CHANCERY DIVISION.]

STUART V. GOUGH ET AL.

Attachment of debts—Undistributed share under a will—Debts due and accruing due—Receiver—Garnishee also one of the garnishees—Personal and representative capacity—Interpleader—O. J. A. r. 376.

The share of a testator's estate, to which a judgment debtor is entitled under a will directing the same to be sold and divided, may be attached under O. J. A. Rule 370, though at the time of the garnishee proceedings, the said share is unascertained and undisturbed.

Thus in the present case, a testator left his real and personal property to the defendants as executors and trustees, on trust to sell and divide among his children (of whom S. S. was one), and died in May, 1883. Subsequently J., one of the defendants, obtained judgment against S. S., and the usual attaching order and summons upon which an order was made, upon notice to the defendants, requiring them to pay the debts due by them to S. S. when the same should become payable. After the attachment, J. S. recovered judgment against S. S., and J. M. S. was by an order made without notice to the defendants, appointed receiver, and after his death the plaintiff A. S. was appointed receiver in his place. Notice of the making of these orders was given to the defendants after they were made.

In 1886 the defendants, as executors as aforesaid, sold the testator's estate, and realized the share of S. S., and paid it over to J., under the attaching order, and afterwards distributed the rest of the estate. A. S. who had demanded the money from the defendants, before they paid it over, and with whom S. S. was joined as a co-plaintiff, now sued the defendants, claiming payment of the amount of S. S.'s share to him.

Held, that the attaching order was properly made, and the defendants were bound by it, and the payment made by them under it, discharged them under marginal rule 376, and the action must be dismissed, with costs.

In re Cowan's Estate, 14 Ch. D. 638, and *Leaming v. Woon*, 7 A. R. 42, followed in preference to *Webb v. Stenton*, 11 Q. B. D. 518.

Held, also, that the fact of J., the attaching creditor, being one of the executors in whose hands the share of S. S. was attached, did not invalidate the garnishee proceeding, as he attached in a personal capacity, whereas he held the fund attached in a representative capacity.

Held, lastly, that the defendants were not bound to interplead on receiving notice of the appointment of the receiver.

THIS was an action brought by Alexander Stuart, and Samuel Sault, against the executors and trustees of the will of James Sault, claiming payment over to Alexander Stuart, as receiver in a certain action, of the share of Samuel Sault, as a beneficiary under the said will, under the circumstances mentioned in the judgment.

The action came on for trial on October 20th, 1887, before Ferguson, J.

MacKelcan, Q.C., and *Gausby*, for the plaintiffs. The legacy was not a debt at all at the time of the garnishee order: *Webb v. Stenton*, 11 Q. B. D. 518; O. J. A. marg. rule 370. The land was not sold till August, 1886. Moreover, the judgment creditor James Sault was one of the executors, and there was no third person within the meaning of Rule 370.

Moss, Q.C., and *Clement*, for the defendants. The proper mode for suing in this action would be in the name of Samuel Sault alone. The joining of the receiver as a co-plaintiff is improper. This action is then brought by Samuel Sault for his share of his father's estate, and if Samuel Sault can receive nothing, nothing can be got. The executors were express trustees to sell the lands and divide the money. The only indebtedness from the executors to Samuel Sault was the share of the estate. There was no other liability at all. Again, the attaching order was before the recovery of the judgment, and before the appointment of the receiver in the suit of *Simpson v. Sault*. The order for payment over was binding on Samuel Sault as long as it remained unchallenged. Samuel Sault could not complain of the payment over of the money. Again, there was no want of good faith here. In *Re Cowan's Estate*, 14 Ch. D. 638, it was held that in case of a claim just such as this garnishee proceedings were effectual. This was followed in *Leaming v. Woon*, 7 A. R. 42. See also O. J. A. marg. rules 370, 376; *Hamer v. Giles*, 11 Ch. D. 942; *Lloyd v. Wallace*, 9 P. R. 335; *Tapp v. Jones*, L. R. 10 Q. B. 591. The Judge who made the attaching order had all the jurisdiction that the Judge here has. The direction to sell in the will amounted to a conversion of the lands into money. We refer to *Farquhar v. City of Toronto*, 12 Gr. 186. The notice to the executors of the appointment of the receiver before payment of the money can make no difference whatever. The receiver was not a general receiver. The defendants had to pay over or suffer execution against them. If the plaintiff should succeed, then it may be that the money should be divided, if it may be considered as in Court: *Dawson v. Moffatt*, 11 O. R. 484.

MacKelcan, in reply. The receiver demanded the money from the executors before it was paid over under the order to pay over; this is not disputed. There was nothing on which the attaching order could operate. No payment made after notice of the appointment of the receiver could affect his rights. Simpson has no *locus standi* to set aside the garnishee proceedings. As to attaching moneys in the hands of the applicant and another see *Nonell v. Hullett*, 4 B. & Ald. 646. The executors should have interpleaded rather than pay the money over. If the garnishee order had been obtained after the appointment of the receiver, the same arguments might be used.

November 11th, 1887. FERGUSON, J.—The plaintiff states that James Sault, late of the township of Puslinch, made his will, in February, 1882, whereby he appointed the defendants executors thereof, to whom he gave his real and personal property in trust to be sold for the benefit of his eight children, the proceeds to be divided among them, share and share alike, but so that the son Samuel Sault should receive four hundred and fifty dollars less than the other children: that the testator died in May, 1883: that in the year 1883, one James Simpson recovered a judgment against the son Samuel Sault for \$1,645.14, with costs \$67.05: that by way of awarding equitable execution in favor of Simpson upon that judgment, one James M. Stuart was appointed receiver: that his appointment took place on October 27th, 1883: that notice of the judgment and appointment was then given to the defendants: that in February, 1886, James M. Stuart died, and the plaintiff Alexander Stuart was appointed in his place and stead, and notice of his appointment forthwith given to the defendants: that the defendants after the obtaining of the said judgment and the appointment of the receiver, sold the real and personal estate comprised in the will, and received the proceeds of the sale; that the proper share of Samuel Sault (who is one of the plaintiffs) amounted in the month of August, 1886, to the sum of \$541.91; that

the judgment is wholly unsatisfied; and the defendants have neglected and refused to pay, &c., stating also that the action is brought by the plaintiff Alexander Stuart, as receiver, by leave of the Court, and that Samuel Sault is by such leave joined as a plaintiff, and asking an order for payment of the share of Samuel Sault, with costs of the action.

The defendants say that on the 30th of August, 1883, James Sault obtained a judgment against the plaintiff Samuel Sault for \$750.21 and costs: that on the 3rd of September, 1883, an attaching order and summons was made by the Local Judge at Berlin, whereby it was ordered that all debts owing or accruing due from the defendants herein (therein named as garnishees), to the said Samuel Sault (therein named as the judgment debtor), should be attached to answer the judgment of the 30th of August, 1883, for the \$750.21 and costs, the whole amount of which remained due and unpaid: that on the 15th day of September, 1883, an order was made by the same Local Judge, after due notice to the defendants herein and after hearing the defendants in person, whereby it was ordered that the defendants herein should pay to the judgment creditor James Sault the debt due from the defendants to the said Samuel Sault (or so much thereof as might be sufficient to satisfy the said judgment debt), as and when the debt due from them to the said Samuel Sault should become payable, and that in default thereof execution might issue for the same: that the debt referred to in the last mentioned order was the claim of the said Samuel Sault to a share in the proceeds of the estate and effects, real and personal, of the testator James Sault, that being the only debt referred to in the affidavit of the judgment creditor, on which the attaching order was obtained: that copies of the said orders were duly served upon the defendants herein: that Simpson's judgment was not obtained until the 3rd day of October, 1883, and was amended by an order of the 12th day of October, 1883: that writs of execution against goods and lands were issued upon the judgment in favour of

James Sault, and were directed and delivered to the proper sheriff, who was required to levy of the goods and chattels, and lands and tenements, of the said Samuel Sault the said sum of \$750.21, &c.: that such writs were duly renewed and remained in full force, &c.: that the defendants were delayed in winding up the estate of the testator by certain proceedings under the Quieting Titles Act, and on or about the 12th of August, 1886, and while the garnishing orders, and the said order of the 15th day of September, 1883, were in full force, and while the writs of execution aforesaid remained in the hands of the sheriff and in full force, and while the said sum of \$750.21 and interest remained wholly due and unpaid upon the said judgment, the defendants paid over to the said James Sault, on account of the said judgment, the sum of \$541.91, that being the full amount of the share of the said Samuel Sault in the estate, real and personal, of the said James Sault deceased, and that the defendants forthwith thereafter proceeded to wind up the estate, and have distributed the proceeds thereof amongst the various parties entitled to share therein, and have no funds in their hands belonging to the said estate: that the action *Simpson v. Sault*, in which the plaintiff Stuart claims to have been appointed receiver, was begun by Simpson, as a creditor of Samuel Sault, to realize a debt due from Samuel Sault to Simpson, and that the receiver was appointed for the sole purpose of enforcing payment of the claim of Simpson against Samuel Sault; and that the judgment appointing the receiver was without notice to the defendants, and was improvidently and improperly rendered, and is not binding upon the defendants.

The defendants say that they were bound by the prior order of the 15th of September 1883, to pay over the said sum of \$541.91 to James Sault; and further that the interest of Samuel Sault in the estate of the late James Sault was a "personal interest," and that Simpson improperly registered against the lands that were of James Sault a certificate of *lis pendens*.

There is also a statement respecting the proof of a claim before the master at Berlin, the effect of which is alleged to be a waiver by the plaintiffs of their rights (if any) as receiver of the estate of Samuel Sault.

The defendants then submit that even if the \$541.91 had been paid over to the plaintiff Stuart as receiver, he would have held the money subject to the priorities of the creditors of Samuel Sault, and would have been liable at once to be called upon by James Sault to pay the same over to him on account of his judgment debt, and they say that the plaintiff Stuart, before the commencement of this action, was notified that the claim of James Sault against Samuel Sault more than exhausted the share of Samuel Sault in the estate of James Sault, deceased.

The 13th paragraph of the statement of defence alleges that there is a former suit pending for the same cause as is the present action.

With the exception of this 13th paragraph, all the allegations in the statement of defence were by the plaintiffs, at the trial, admitted to be true ; and upon this admission, and without any further or other evidence, the trial took place. This is my reason for making so lengthy a statement of what is contained in the pleadings.

The defendants, as executors and trustees, were directed to sell and convert the estate of the testator James Sault, and to divide the proceeds of the sale as before stated.

The share of the estate to be paid (under the distribution) to Samuel Sault was, as it turned out to be, \$541.91, and about this sum is the contention.

The delay for two or three years in converting and distributing the estate is explained and accounted for by the necessary proceedings to quiet the title to the lands under the provisions of the Act for quieting titles.

The debtor, Samuel Sault, was thus entitled, but the money had not come into the hands of the trustees and executors at the time of the garnishee proceedings by James Sault. For the plaintiffs it was contended that as the property had not at the time been sold, and the money

had not come into the hands of the defendants, there was not, and could not have been then a debt owing from them (the defendants) to the debtor Samuel Sault, in other words, that there was not then an existing obligation on the part of the defendants to pay either then or in the then future, any sum of money, and therefore no debt existing from them to him, and that for this reason the attaching order and the order to pay over above mentioned, were improperly made and inoperative. For this contention the case *Webb v. Stenton*, 11 Q. B. D. 518, was (amongst others) relied on. This decision of the Court of Appeal in England disapproves of the decision in the case *Re Cowan's Estate*, 14 Ch. D. 638.

The views expressed by the learned Judges on *Webb v. Stenton*, in appeal are, I think, much in favor of the contention of the plaintiffs on this subject. So far, however, as I am able to discover, the view there expressed differs from that which was entertained by our own Court of Appeal in the case of *Leaming v. Woon*, 7 A. R. 42, where the learned Chief Justice said, at p. 49, speaking of the decision in *Re Cowan's Estate*: "It is a decision which we should be glad to follow; and, as the Judicature Act of this province has since been passed, making the same provision as to the garnishment of debt as had been made in England when *In re Cowan's Estate* was decided, we may properly follow that case in the case before us."

Another of the learned Judges said, at p. 51: "A recent decision (*Re Cowan's Trusts*) extends this doctrine, and holds that moneys payable under an order of a Court, but in the hands of a receiver, are liable to garnishment to the same extent as if the fund were not in Court, but in the hands of a trustee, whose duty it was to pay it over to the debtor; and the learned Judge held further, that the attaching clauses were not confined, as has been sometimes decided, to a debt existing at the time, but payable in futuro, but should in a case like the present, extend to the income from time to time becoming payable to the debtor. If that case be well decided, and it commends itself to one's

ideas of justice and common sense, the petitioners have a complete remedy by garnishee process." The other two of the learned Judges concurred in the judgments.

This seems to me to be a plain expression of the opinion of our own Court of Appeal under the change that had been made in the law, and, I think, the opinion applies to the present case, as the orders here were in respect of moneys to come into the hands of the executors and trustees under the provisions of the will, and to be by them paid over to Samuel Sault. The effect is probably to set up the decision in the case *The Bank of British North America v. Matthews*, 8 Gr. 486, for a reference to which I am indebted to Mr. Justice Proudfoot, a case often disapproved of under the law as it then stood.

Other cases were referred to by counsel on this subject, but I think my duty is to follow the opinion expressed by our own Court of Appeal; and in doing so, I come to the conclusion that the plaintiffs' contention on this immediate subject fails, and being of this opinion, it is wholly unnecessary for me to say what I should consider to be within my power or my duty in respect to the orders of the local Judge had I been of the contrary opinion. Under these orders the money was paid by the defendants. They paid the money pursuant to an order of the Court, and they are now asked to pay it a second time. Rule 376 provides that payment made, or execution levied under any such proceeding as aforesaid, (referring to garnishee proceedings), shall be a valid discharge as against the judgment debtor to the amount paid or levied, although such proceedings may be set aside or the judgment reversed. The judgment debtor is one of the plaintiffs here, and the one whose name as plaintiff is indispensable, the one in whose right, as it appears to me, the plaintiffs must recover, if they recover at all.

It was also contended that as the attaching creditor, James Sault, was himself one of the executors and trustees against whom the proceedings were, the orders were objectionable and of no force.

It has been said to be doubtful whether or not a person can attach moneys in the hands of himself and another, and the reference is to the case *Nonell v. Hullett*, 4 B. & Ald. 636.

A perusal of section 543 of *Drake on Attachment*, 5th ed., and the cases there referred to shows that there is a difference of opinion on the subject in the different American Courts. However that may be, I do not think it precisely the case here. The difference is this: James Sault, the judgment creditor, claimed the money as his own money on account of a debt being due to him by Samuel Sault; James Sault was one of two (a board) of trustees into whose hands the moneys of Samuel Sault came, or were to come to be paid over to Samuel Sault; as judgment creditor, he was acting in his own right; as garnishee he was acting in a representative capacity; and it seems to me that this distinguishes the case from a case in which a man seeks to attach moneys in the hands of himself and another.

It was also contended that the defendants on receiving notice of the appointment of the receiver should have interpleaded before paying over the money. I am not of this opinion. On the subject, though perhaps not altogether in point here, the interesting case *Victoria Mutual Fire Ins. Co. v. Bethune*, 1 A. R. 398, may be looked at.

On the whole case I am of the opinion that it appears (sufficiently) that the defendants paid over the money in question, in pursuance of an order made by a Court of competent jurisdiction, and that they are protected. I think there should be judgment for the defendants; and I see no sufficient reason for withholding costs.

Action dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

STEVENS V. THE LONDON STEEL WORKS COMPANY.

DELANO'S CASE.

Corporations—Shareholders—Prospectus—Material change—Change in amount of capital—Contributory—Winding up.

One D. signed his name as subscriber for a certain number of shares at the foot of a prospectus of a proposed company, in which it was stated that the capital was to be \$75,000. Without D.'s knowledge or acquiescence, the company, as afterwards incorporated, had a capital of \$150,000. In accordance with the terms of the subscription, and before the incorporation of the company, D. paid up half the amount of his shares. There was no allotment of stock to D., no entry of his name in any stock book, and no acting on his part as shareholder. The company being in process of liquidation, it was claimed that D. was a contributory.

Held, that the change made in the capital of the company was a material one, and there being no acquiescence or laches on D.'s part, he was not liable as a contributory.

Pitchford v. Davis, 5 M. & W. 2, specially referred to.

THIS was an appeal from the certificate of the Master in London, wherein he found that Alexander Delano was not liable to contribute to the assets of the London Steel Works Company, which was being wound up in his office, under an order of May 27th, 1884.

It appeared that the company had been incorporated under the Ontario Joint Stock Companies' Act, on January 25th, 1883, with a capital of \$150,000, divided into 1,500 shares.

There never was a meeting of directors, or any stock books or allotment of stock.

Delano had signed his name for fifty shares at the foot of a Prospectus, headed "Dominion Steel Works Company, London East, Ont., capital \$75,000, 750 shares of \$100 each," wherein it was stated, "to carry on this business, it is proposed to form a company * * and to provide a capital of \$75,000 for the purchase of patent rights, real estate, and the construction of buildings, &c.;" and immediately above the signature of Delano and the other subscribers, were the words: "We, the undersigned, by our respective signatures and seals, hereby agree to accept

the number of shares set opposite our names and to pay for the same ; one half at the time of subscribing, and one half when the charter is obtained and buildings, plant, &c., completed."

Delano admitted his signature to the prospectus, and said on examination he became a shareholder on the condition that he was to pay \$2,500 cash, and the balance to be paid out of the dividends of the company ; that he never received any stock or any notice of allotment of stock, or of the acceptance of his proposal to take stock ; and that he never attended a meeting of share-holders, and did not know that he was being put into a company of \$150,000 ; the prospectus shewing only \$75,000.

A receipt was put in and proved as follows :

" LONDON, Ont., Dec. 29th, 1882.

" Received from Alexander Delano, Esq., the sum of \$2,500, in part payment on \$5,000 of subscribed stock in London Steel Works Company, the balance to be paid for out of future profits.

" (Signed)

" THOS. MUIR."

Mr. Muir was one of the directors of the London Steel Works Company. The notice of motion for this appeal, stated that it was because the Master had found Delano not liable to contribute to the asset, whereas, he not having paid up his stock in the said company, was liable to contribute to the amount of his unpaid stock.

The appeal came up for argument before Boyd, C., on November 22nd, 1887.

G. C. Gibbons, for the appeal. Delano is too late : *Peel's Case*, 36 L. J. Ch. 757 ; *Williamson's Case*, L. R. 2 Ch. 536. As to no allotment having been made, the payment of \$2,500 on his shares is a waiver of this. It is too late after a man has made a payment like this, for him to say there was no subscription and no allotment. There was the original subscription, and though there was a change in the capital, and the respondent says a new company, he went on and paid to the new company as on his old subscription, the \$2,500.

By his receipt he admits he subscribed for \$2,500 on account of \$5,000 subscribed capital stock in the London Steel Works Company; the balance to be paid out of future profits. He stood his chance of there being future profits. And as to any question of misrepresentation, no such question can be raised against creditors: *In re Overend, Gurney & Co., ex parte Oakes and Peek*, L. R. 3 Eq., 576; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Tennent v. The City of Glasgow Bank*, 4 App. Cas. 615. These shew where a party has a ground which could relieve him from liability, he must take action before liquidation proceedings. Whatever objection a shareholder is to take to his contract on the ground of misrepresentation, he must have repudiated it, and taken action before the winding-up proceedings. Having subscribed and paid the \$2,500, Delano cannot, as against creditors of an insolvent company, raise the objection he seeks to raise.

M. D. Fraser, for the contributory. Delano could not have found out the change in the capital of the new company, unless he had some notification. He had no such notification. Putting a man into a company of \$150,000 capital instead of \$75,000, giving him a thirtieth interest instead of a fifteenth interest, is, I submit, a fatal objection. Then there is no assent by the company to our application and no allotment. This being so, the company is not bound. The cases are strong as to this: *Nasmith v. Manning*, 5 A. R. 126, 5 S. C. R. 417; *Pellatt's Case*, L. R. 2, Ch. 557; *Wilkinson's Case*, L. R. Ch. 536; *In re Universal Banking Corporation*, *Gunn's Case*, L. R. 3 Ch. 40; *In re Rolling Stock Company of Ireland*, *Shackleford's Case*, L. R. 1 Ch. 567; *In re Universal Banking Company*, *Roger's Case*, L. R. 3 Ch. 633; *In re Aldborough Hotel Company*, *Simpson's Case*, L. R. 4 Ch. 184; *In re Baranjah Oil Refining Co.*, W. N., 1887, p. 136; *In re Medical Attendance Association*, *Onslow's Case*, W. N., 1887, p. 79.

Gibbons, in reply. As to their being no allotment by the company, we say the company receiving and using the

\$2,500, is a complete answer. We say the evidence shews Muir received the money for the company. Innocent creditors have the right to assume Delano was a shareholder.

December 15th, 1887. BOYD, C.—The ruling of the Master refusing to place Delano on the list of contributories appears to be well-founded. As the matter stands upon the facts, the question is, whether Delano could be required to take stock in the company according to the terms of his subscription at the foot of the prospectus, *i. e.*, could his contract there evidenced, be specifically enforced? The facts shew that there was no allotment of stock to him, no entry of his name in any stock book, no acting on his part as shareholder, and no knowledge till during these proceedings as to the change made in the capital of the company. In that appears to me to be the crucial point. His subscription was to take fifty shares in a company to be formed, of which the capital was to be \$75,000 in 750 shares of \$100 each. Subsequently the promoters obtained letters patent under the Ontario Act, R. S. O. ch. 150, in January, 1883, by which the capital was fixed at double the amount *viz.*, \$150,000 in \$100 shares. This was not in any way communicated to Delano, and therefore laches cannot be imputed to him, especially as he was not a shareholder, and his name in no way appears in the company's books so as to mislead creditors. The general principle is enunciated by Lord Cranworth in *Downes v. Ship*, L. R. 3 H. L., p. 356, in these words: "When, on the faith of a prospectus, a person agrees to take shares in a projected company, the terms of whose business are thereby defined, if those who afterwards form the company include in the memorandum of association terms not to be found in the prospectus, the person who had applied for shares on the faith of the prospectus, may refuse to accept an allotment of shares." This, of course, implies that the change, whether of omission or addition, must be material. In the present case, the materiality of the change is not open to doubt. Upon the evidence Delano swears, "I

think it would have made a great difference to me to come into a \$150,000 company instead of into a \$75,000 one. I think the capital is too great. I certainly would consider it an injury to me if the company issued \$150,000 instead of \$75,000. * * I did not know that I was being put in a company of \$150,000." He means that the prospects of doing a profitable business on the larger capital would not be promising, and that while content to try the chances on half of that capital, he would not have it doubled; the effect of which would be to reduce the profits if the venture proved a success. This is quite a legitimate and intelligible position. Now, as a matter of law, this change was an important one. As put by Lord Denman in *Smith v. Goldsworthy*, 4 Q. B., at p. 465, "the amount of the shares is properly part of the constitution of the company." The variation here made affected the basis of contract; and to use Chief Justice Tindal's language, it may be said that neither capital nor number of shares bears any reasonable proportion to the original plan and project:" *Fox v. Clifton*, 6 Bing., p. 798. In *Pitchford v. Davis*, 5 M. & W. 2, Lord Abinger said: "I thought at the trial, and still am of the same opinion, that where a prospectus is issued, and shares collected for a speculation, to be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable * * unless the terms of the prospectus in that respect are fulfilled." The result of the authorities is summed up by Lindley thus: "The probable success of any company depends very much upon the capital intended to be embarked in its projected business; if that capital is inadequate, it will probably be wholly lost; whilst if it is more than is required, the interest upon it may eat up all the profits. Hence the amount of a company's capital is one of those things which, when fixed, cannot be varied without the consent of all who join the company:" *Law of Partnership*, 3rd. ed., vol. i., p. 633. The importance of any change in the way of increasing capital, is seen by the safe-guards which are thrown round it by the Legislature

in the Act under which this company was incorporated: R. S. O. ch. 150, secs. 18, 21, *et al.*

I arrive, thus, at the conclusion that there was an important and material variance between the prospectus and the charter of the company, to which Delano did not assent, and of which he was not informed till after the winding-up had begun. Against him, therefore, this contract to take shares cannot be enforced. I refer to other analogous cases of which the principle applies: *Sewell's Case*, 3 Ch. 131; *Stewart's Case*, 1 Ch. 574; *Webster's Case*, L. R. 2 Eq. 741; *Ship's Case*, 2 DeG. J. & S. 544; *Felgate's Case*, *ib.* 456.

The appeal is dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

ROBERTS V. McDONALD ET AL.

Mechanics' lien—Registered lien—Necessary statements therein—Demurrer—R. S. O. ch. 120, secs. 4, 20.

Where in an action to enforce a mechanics' lien the plaintiff purported to set out on his statement of claim the registered lien verbatim, and the same as so set out, did not show that the work was done and the material furnished within thirty days from the registration of the lien, nor the amount due.

Held, on demurrer, bad, but leave given to amend.

THIS was a demurrer to the statement of claim in an action brought by William Roberts to enforce a mechanics' lien against certain property of George McDonald; William Lister Sagar, a mortgagee, who, as the plaintiff alleged, had advanced the mortgage money after notice of the plaintiff's lien, being joined as a party defendant.

The statement of claim first set out the employment of the plaintiff as a builder, by the defendant McDonald, and alleged the doing of the work and the supplying of the

material, in respect to which the lien was claimed, and the defendant McDonald's default in the payment of the same ; and went on to allege as follows :

7. " On or about the 23rd day of April, 1887, the plaintiff caused a lien to be filed in the Registry Office for the sum of \$750, under the " Mechanics' Lien Act," and the amending Acts, which said lien is in the words and figures following : ' William Roberts of the city of Toronto, in the county of York, builder, claims a lien upon the estate or interest of George McDonald, of the city of Toronto, builder, in respect of the following work and materials, that is to say, for work done and materials supplied on or for the erection of buildings on the lands hereinafter described, which work was done and materials were furnished for the said George Macdonald, on or before the 22nd day of April, 1887.

The description of the lands to be charged is the following : Lots 142 and 143 on the west side of Howland Avenue, in the township of York in the said county of York.

The said George McDonald is the registered owner of the said lands, and William Lister Sagar, of the said city of Toronto, is registered in said Registry Office as mortgagee thereof.

Dated at Toronto, this 22nd day of April, 1887.

(Signed) WM. ROBERTS.

County of York, { I, William Roberts, of the city of Toronto, in the
TO WIT : { county of York and Province of Ontario, builder,
named in the above statement of claim, make oath
and say, that the said statement is true.

Sworn before me at Toronto, in the county of

York, this 22nd day of April, A. D. 1887.

(Sgd.) G. M. GARDNER.

(Sgd.) WM ROBERTS.

Notary Public.

which statement of claim in said lien was verified by an affidavit of the plaintiff, sworn before a Notary Public, for taking affidavits in the Province of Ontario, as required by the said statutes."

And the plaintiff went on to allege the advances by Sagar, as mortgagee, after notice of his lien, and claimed priority over the claims of the defendant, William Lister Sagar ; that the defendants might be ordered to pay the plaintiff the sum due and costs of filing the said lien together with interest on the said sums from the 22nd of April, 1887, at which date he claimed the money was due ; that in default of such payment, the estate and interest of the defendants in the said land might be sold and the proceeds applied in and towards payment of the plaintiff's claims and costs of and incidental to the draw-

ing and filing of the said lien and of this action, pursuant to the Mechanics' Lien Act and amending Acts.

The defendants demurred to this statement of claim, and said that the same is bad in law on the ground that :

1. The plaintiff's statement of claim does not allege that the work was completed and materials furnished within thirty days immediately prior to the registration of the lien, nor that the *lis pendens* was registered within ninety days after the work was completed or materials furnished.

2. The affidavit verifying the statement of claim filed by the plaintiff in the registry office for the county of York, is insufficient, same having been sworn before a Notary Public and not before a commissioner for taking affidavits in the county of York.

3. The plaintiff's statement of claim does not allege that the notice to the defendant Sagar of the plaintiff's claim was in writing.

4. The plaintiff's lien as set out in the statement of claim does not state the sum claimed as due or to become due to the plaintiff.

The plaintiff's statement of claim does not allege the amount by which the work done and materials furnished increased the selling value of the land, nor does it allege that the selling value was in any way increased by such work done or materials furnished, therefore the same is bad in law as against the defendant William Lister Sagar. And on other grounds sufficient in law to sustain the demurrer.

J. H. Ferguson, for the demurrer. R. S. O. ch. 120, sec. 20, provides that every lien not duly registered under secs. 4 and 5, shall absolutely cease to exist thirty days after work completed. Section 4 shows how a lien shall be registered. Here the statement of claim shews the registration defective in not pointing out the time or period within which such material was furnished and work done, nor the amount. Moreover, the affidavit of verification was not sworn before a commissioner, but before a Notary Public, and even the Act of 1885, 48 Vic. ch. 16, (O.) does not authorize a Notary Public to take an affidavit of this kind. The statement of claim simply says work was done "on or before" such and such a date. It is clearly defective in this. It is also required that the sum claimed should be stated—no sum is here stated. I refer to *Reynolds v. Williamson*, 25 C. P. 49; *In re Lyons*, 6 O. S. 627; *Robinson v. Waddell*, 24 U. C. R. 574; *Carrier v. Friedrich*, 22 Gr. 243; this shows the registration must be strictly in accordance with the Act. There are wider differences here

than there were in *Currier v. Friedrich*. Under such a registration as this, a stranger searching for registrations could not ascertain if the period of credit had expired.

Kappele, contra. I refer to *Scane v. Duckett*, 3 O. R. 370. [PROUDFOOT, J.—That was only a question of procedure, and does not affect the rights of the parties.] We are only bound to refer to a lien. [PROUDFOOT, J.—But you have not done so. You purport to set out the lien registered.] But it does not go to the root of the cause of action. It was not essential to put in our pleading, the lien in particular. [PROUDFOOT, J.—You may have done more than you need have done. You may have stated yourself out of Court. You go on and say “which said lien is in the words and figures following, &c.”] The lien is copied wrongly in the statement of claim. [PROUDFOOT, J.—Why did you not amend? Again, you did not show the time when your work was done.] That is like the case in 3 O. R. 370. [PROUDFOOT, J.—You were bound to allege that you had registered a proper lien.] The affidavit is properly sworn under the Act of 1885. All that we have not set up, is matter of proof. We were not bound to set it up.

Ferguson, in reply. *Scane v. Duckett*, *supra*, is not in point. The Attorney's Act says *no action shall* be brought unless certain things are done; but the Mechanics' Lien Act says, unless certain things are done, the lien shall actually cease.

November 9th, 1887. PROUDFOOT, J.—I think the statement of claim is defective upon two grounds apparent on its face :

(1) It does not appear in the form of registered lien as there set out when the work was done; that the work was necessarily done within the period referred to.

(2) The plaintiff professes to state his claim, and how it was registered, and some vagueness as to when the work was done, and the amount for which the lien is recorded, is apparent. The plaintiff, perhaps, might have merely

referred to the claim, but he purports to set it out *verbatim*.

The demurrer must be allowed on these grounds, but the plaintiff must have leave to amend within fourteen days.

A. H. F. L.

[COMMON PLEAS DIVISION.]

MEAD V. O'KEEFE AND HAWKE.

Partnership—Dissolution—Good will—Injunction—Chancery decree—Estoppel.

A partnership deed was executed by the defendants, O. & H., and by M. as malsters and brewers in Toronto for three years, whereby O., for \$25,000, sold to H. and M. all his interest in the goodwill of the firm, &c., theretofore existing between himself and G. M. H. as brewers, &c., as also that which he would be entitled to on the expiration or sooner determination of the partnership then formed, and agreed to assign the same to them, and to execute a good and sufficient deed therefor; and also agreed in the meantime to fully initiate H. & M. in the business. Clause 19 provided for the accounts being taken at the expiration or sooner determination of the partnership, and for payment to the partners of the value of their shares. Clause 21 provided, in case of death of any of the partners, for the payment to his representatives of his share in the partnership property and effects; but as respect O., nothing should be paid for goodwill. By clause 26, in case of death of either H. or M. before the expiration of the term, the survivor should pay the deceased's representatives, in addition to what they should be entitled to under clause 21, \$12,500 in full of the goodwill bought from O. By clause 27, in case of the dissolution of the partnership before the expiration thereof, either by death of one of the partners, retirement under clause 2, or by compulsion under clause 3, in case of O., the other two might carry on the business and share equally in the losses and profits; but in case of H. or M., then the partnership should be continued until the expiry of the three years, and the one remaining on should have the option of buying the other's interest in the capital stock and assets, and be entitled to half the profits and liable for half the losses. By clause 29, if either H. or M. should retire under clause 2, or be compelled to leave under clause 3, he should not be entitled to receive anything for the goodwill. Clause 3 provided for dissolution upon breach or non-observance of any stipulation in certain of the articles, upon notice in writing being given thereof; and the parties receiving notice should be considered as quitting the business for the benefit of the other partners. Subsequently M. misconducted himself in the business, when O., acting for himself and H., informed M. that he must leave the firm. A paper was then drawn up in the shape of a notice, and signed by O. H. & M., stating that the partnership was that day "dissolved by mutual consent, Messrs. O. & H., who

will continue the business, are authorized to collect all debts due to the late firm, and will meet all liabilities;" and under this there was a further notice, signed by O. & H., stating they, O. & H., had that day, "entered in partnership as brewers, &c., under the new style of O. & Co., who will continue the business as formerly." A suit was brought in the Chancery Division by the now plaintiff, as assignee of M. under an assignment to her, and a decree made for an account, but not as to the goodwill, because, as stated, it was held that the goodwill did not pass thereunder. The goodwill was then assigned by M. to plaintiff, and an action brought to recover the value thereof, and for an injunction to restrain the defendants from using the assets, and that the business might be sold as a going concern.

Held, [CAMERON, C. J., dissenting], that there was no forfeiture of M.'s interest in the goodwill; that the effect of the clauses relating thereto in the partnership articles was to separate the goodwill from the rest of the assets, and that the reasonable intendment from what was done at the time of dissolution was that defendants should pay a reasonable sum therefor; and therefore M., and so plaintiff, was entitled to recover the value thereof, which must be deemed to be \$12,500; but that the injunction must be refused, for that M. had agreed that defendants might use the goodwill in continuing the business, and, having so agreed, he could not interfere with them in so doing: that both parties were estopped by the chancery proceedings, the plaintiff from denying the defendant's right to enjoy the assets of the business, and the defendants from setting up a forfeiture under clause 3.

THIS was an action brought by the plaintiff, under an assignment thereof to her, to recover the value of the share and interest of Joseph Hooper Mead in the goodwill of the business of O'Keefe & Co., of which the said Joseph H. Mead had been a partner; and claiming an injunction restraining the defendants from using the assets, and that the business might be sold as a going concern.

The case was tried before Cameron, C., J., without a jury, at Toronto, at the Spring Assizes of 1886, who delivered the following judgment:

"I find that the dissolution of the partnership existing between Joseph H. Mead and the defendant was a dissolution in fact under the 3rd article or stipulation of the articles of partnership by reason of the said Joseph H. Mead having improperly used the moneys of the firm for his private purposes and lending the same to other parties, as in the 5th paragraph of the statement of defence alleged, in consequence whereof, under article 29 of the articles of partnership, he is not entitled to any goodwill in the said partnership. I therefore dismiss the plaintiff's action, with costs."

The facts, so far as material, are set out in the judgment of Rose, J., herein.

In Easter Sittings *J. A. Worrell* moved, on notice, to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

In Michaelmas Sittings, November 30, 1886, *MacLennan*, Q. C., and *Osler*, Q. C., supported the motion, and referred to *McNeeley v. McWilliams*, 13 A. R. 324; *Bluck v. Capstick*, 12 Ch. D. 863; *Lee v. Page*, 7 Jur. N. S. 768, 30 L. J. N. S. Ch. 857.

Moss, Q. C., and *G. T. Blackstock*, contra, referred to *Levy v. Walker*, 10 Ch. D. 436; *Chappell v. Griffith*, 53 L. T. N. S. 459; *Banks v. Gibson*, 34 Beav. 566; *Steuart v. Gladstone*, 10 Ch. D. 626; *Pearson v. Pearson*, 27 Ch. D. 145; *Bluck v. Capstick*, 12 Ch. D. 863; *McNeeley v. McWilliams*, 13 A. R. 324; *Clever v. Kirkman*, 33 L. T. N. S. 672, 24 W. R. 159; *Pawsey v. Armstrong*, 18 Ch. D. 698.

March 12, 1887. *ROSE, J.*—On the 3rd of April, 1882, a deed of partnership was executed by the defendants and one Joseph Hooper Mead, under which the parties engaged to carry on the business of maltsters and brewers, in Toronto, for three years.

By clause 20 O'Keefe, for the consideration of \$25,000, then paid to him, sold and disposed to Widmer Hawke and Joseph Hooper Mead "all his interest in the goodwill of the firm and partnership heretofore existing between him and George Macaulay Hawke as brewers and maltsters, and all his interest in the goodwill of the business to be made and carried on by the partnership hereby formed, which he would be entitled to upon the expiration or sooner determination of this partnership; and in the meantime to fully initiate and instruct the said Widmer Hawke and Joseph Hooper Mead in the business of brewing;" and assigned to them, the survivors and the executors and administrators of them and the survivor "all the right, title, interest, claims and demand of him, the said Eugene

O'Keefe, his executors or administrators, of, in or out of the goodwill of the business and partnership heretofore existing between him, the said Eugene O'Keefe, and George Macaulay Hawke, carrying on business as brewers and malsters under the name and style of "O'Keefe & Co.," at the said city of Toronto, and also in the goodwill of the business to be made and carried on by the partnership hereby formed."

O'Keefe further covenanted to execute "a good and sufficient deed assigning and transferring to them all his right, title, and interest in the said goodwill as aforesaid."

Then follow provisions for the said O'Keefe entering into partnership with both or either as might be desired by them upon the "expiration of the partnership hereby formed."

And "in the event of no such partnership being formed, or at the expiration of such new partnership if the same shall be formed, he the said Eugene O'Keefe will retire * * and be entitled to receive whatever his share * * may then be * * but shall receive nothing further for the goodwill of the business at that date."

Then follows a covenant by O'Keefe not to carry on a similar business within certain limits for twenty-five years from the end of the term.

Clause 19 provides "That within six calendar months after the expiration or sooner determination of the said partnership," the usual accounts shall be taken and valuation made, and after payment of debts, &c., the balance shall be divided among the three partners—half to O'Keefe, and one quarter to each of the others.

I am of the opinion that the effect of the above clauses was to separate the goodwill from the other assets of the business—as say a lease of the premises might have been separated—and to sell and transfer it to Hawke and Mead for a consideration then paid, that O'Keefe, while in partnership with them, had whatever use and benefit was to be derived from it by such alliance, but that upon the expiration or sooner determination of the partnership, he

ceased to have any right, title or interest in the goodwill which became absolutely the property of the purchasers, Hawke and Mead.

The illustration of a lease or right of occupation seems to me to be apposite. Had O'Keefe sold and conveyed to Hawke and Mead his interest in the right of occupation of the premises for a considerable sum then paid, would it be disputed, that, upon the expiry or sooner determination of the partnership, the remaining partners would have the exclusive right of possession and occupation.

Hawke and Mead purchased, paid for, and received certain property. It became theirs, and its future devolutions must be governed either by express contract or the ordinary rules applicable to all property of a like nature.

By the terms of the partnership deed, so far as I can discover, there is no provision for O'Keefe getting the goodwill back into himself, but there are provisions against any such claim in the event of any continued or future partnership in the same business.

Subsequently Mead overdrew his account, and for private purposes drew a cheque upon a special account which he had no manner of right to do, and aggravated his misconduct by not entering the cheque and denying the act.

Upon discovery, his partners—O'Keefe chiefly acting—were naturally indignant, and refused to continue the partnership, and, notwithstanding his pleadings, insisted upon his leaving the firm. O'Keefe told him, "Of course all confidence between us is gone, a man guilty of anything of this kind, cannot remain in partnership with me." In reply to his request for a day's further time he said, "There is no use, you cannot remain in this firm."

Mr. O'Keefe further said in evidence: "Ultimately we had to send for Mr. Sampson to get up the documents, and he came and prepared a paper. I read this paper over to Mr. Mead myself, and left the paper with him, and he signed it."

The paper was:

" Notice is hereby given that the partnership heretofore existing between the undersigned as brewers and malsters under the style of ' O'Keefe & Co., ' has this day been dissolved by mutual consent. Messrs. O'Keefe and Widmer Hawke, who will continue the business, are authorized to collect all debts due to the late firm, and will meet all the liabilities and engagements thereof. •

E. O'KEEFE,
WIDMER HAWKE,
J. H. MEAD.

Witness—H. N. WILLIAMS.

Dated 12th September, 1883.

Referring to the above, the undersigned would state that they have this day entered into partnership as brewers and malsters under the style of O'Keefe & Co., who will continue the business as formerly.

E. O'KEEFE,
WIDMER HAWKE.

Witness—H. N. WILLIAMS."

Differences having arisen between the parties a suit was begun in the Chancery Division by Elizabeth Mead, as assignee of J. H. Mead, against O'Keefe & Hawke.

Young Mead had, it is said, obtained from his mother the money put in the business by him, and to repay her had assigned to her, by instrument dated 12th September, 1883, " All the right, title, estate, account, claim and demand of him the said party of the first part of, in, to and out of all and singular the real and personal estate of the said firm of O'Keefe & Co. and stock in trade, plant, rights, and credit of the said firm," &c.

In that suit on the 26th May, 1885, a decree was made referring it to the Master to take the partnership accounts; but directing the Master not to allow the plaintiff anything in respect of the goodwill, as the learned Chancellor, we are told by counsel, ruled that the assignment to the plaintiff did not in terms convey the goodwill.

The right to take further proceedings was reserved ; and a new assignment to Mrs. Mead was, on the 1st June,

1885, executed, assigning "All that the goodwill and interest of him the said party of the first part of, in and concerning the said business of O'Keefe & Co.," &c.

Thereupon the present action was brought to recover from the defendants Mead's share in the goodwill; and claiming an injunction restraining the defendants using the assets, and that the business might be sold as a going concern.

The defendants set up the deed, the dissolution, an agreement by Mead to their retaining the business, and the proceedings in the Chancery Division referred to.

Paragraph six of the statement of defence is: "The defendants further say that upon the said dissolution the said Joseph Hooper Mead agreed that the defendants should have any goodwill in the said business which he could have or claim; and the defendants further say that having regard to the events which have happened neither the said Joseph Hooper Mead nor the said plaintiff, was or is entitled to recover any sum of money whatever, for or in respect of the alleged goodwill of the said Joseph Hooper Mead in the said business."

As I have already stated, I think there was a complete purchase and sale of the goodwill, and I see no ground for claiming from O'Keefe a return of the price paid or any part thereof, unless, as has been urged, there was an agreement express or implied at the time of the dissolution under which the claim arises, which question I will consider later on.

There is more difficulty in determining the rights as between Hawke and Mead.

It is urged that clause 29 of the deed governs:

It is as follows: "In the event of either of them the said Widmer Hawke or Joseph Hooper Mead retiring from the said firm hereby formed under article number two, or being compelled to leave the said firm under article number three, the partner so retiring from or being compelled to leave the said firm, shall not be entitled to receive and shall not receive from the other of them or from any

new firm which may be formed to carry on the said business, any sum of money whatever for or in respect of his good will in the said business."

This is a power of forfeiture, and is to be treated *strictissimi juris*. See *Clarke v. Hart*, 6 H. L. Cas., p. 633.

There the head note is: "Where such a power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate; and the forms to be observed in declaring the forfeiture must be strictly followed."

Clause three provides for dissolution upon breach or non-observance of any stipulation in the 14th, 15th, 16th, and 17th clauses of the deed upon notice in writing being given, declaring the partnership to be dissolved and determined, and the partner to whom notice is given "shall be considered as quitting the business for the benefit of the other partners who shall give the said notice."

It may be that the transactions complained of came within one or other of the clauses named; but notice in writing was not given, nor were the formalities complied with.

As clause 29 and clause 3 both create forfeitures, 29 of the good will and 3 of the share of the assets, I think the formalities not having been complied with, the dissolution cannot be said to come under clause 3.

If it came under clause 3, by reason of written notice having been waived as contended, it seems to me clear Mead would have had to quit the business empty-handed for the benefit of the partners giving the oral notice.

That this was not so was made clear by the result of the proceedings in the Chancery Division, under which Mead was paid his share of the partnership assets.

The defendants plead the proceedings in the Chancery Division as estopping the plaintiff from claiming any right to interfere with the use and possession of the assets of the defendants. Do not such proceedings, if they so estop the plaintiff, equally estop the defendants from claiming that any forfeiture arose under clause 3; and, if none arose under clause 3, could any arise under clause 29?

As the goodwill was not a partnership asset, clause 29 was possibly necessary to create its forfeiture, as it strictly would not under the other provisions of the deed have gone to O'Keefe even if he had given the notice under clause 3.

I understood Mr. Moss to admit that if not under clause 3 then the dissolution as it took place was not provided for by any clause.

It seems to me the result is as follows :

Mead acted in such a way as entitled his partners to dissolve the partnership. They told him he must go out. He must be assumed to have known that if he did not consent to a dissolution they could expel him and cause a forfeiture, and therefore he consented. He did not consent willingly, of course, but having the option of either going out or being expelled he preferred the former.

By clause 20 O'Keefe had, at that moment of dissolution, no interest in the goodwill. It belonged to Hawke and Mead ; but by the same clause he was bound at the expiration of the partnership to form a new partnership with both or either as he might be requested.

This may be said not to have been the expiration of the partnership, but a "sooner determination."

However that may be, unless some agreement had then been made, the partnership affairs must have been wound up, each receiving his share of the partnership assets under clause 19, and the business would probably have been sold as a going concern, and the amount realized for the goodwill would have been divided between Hawke and Mead.

But Hawke and O'Keefe agree to form a new partnership to carry on the business ; and to this Mead consents ; and the notice is signed shewing that all parties agree to O'Keefe and Hawke continuing the business, that of course meant under the former name of O'Keefe & Co., on the same premises, with the old customers, with the partnership assets, and generally as usual.

Mead went out. He did not give up his right to his share of the partnership assets which he left ; and the Court has decreed that he must be paid the value thereof.

Could he, after agreeing to have the business continued, have taken proceedings to prevent its continuance? Clearly not; and so the plaintiff's motion for an injunction must fail.

And as O'Keefe and Hawke have the right to continue the business, does that not involve using and possessing the good will?

If they continued the business with the name, assets, stand, and customers, what is left to comprise the good will? Must not the reasonable inference be, that it was then agreed that they should have the goodwill; and so they allege in the above cited paragraph of their statement of defence?

If the defendants were to have the goodwill, were they to pay for it, or was Mead to allow them to use and enjoy it without recompense as they claim?

Must it not be that either Mead forfeited his right to the goodwill, or agreed to allow O'Keefe and Hawke to have it without paying for it—in fact made them a present of it,—or that he is entitled to be paid for it.

What light do the cases cited throw upon the question?

Levy v. Walker, 10 Ch. D. 436, per James, L. J., pp. 448-9, shews that "the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right as against all the world, so that no other person could represent himself as carrying on the same business."

The defendants here claim by their pleadings that they have obtained from Mead the business and goodwill. If so, then the other argument urged at bar, that if the dissolution was by consent Mead had the right to carry on a similar business under the same name cannot, I think, be valid.

Steuart v. Gladstone, 10 Ch. D. p. 627, shews that a good will should be valued to ascertain the interest to which an excluded partner is entitled. The following language

may be quoted, at p. 652 : " It is urged nevertheless that the goodwill ought not to be included. Why? It is part of 'the estate and effects of the partnership.' It is, to use the language of clause 20, a matter 'in its nature susceptible of valuation.' It is a thing in which a partner going out of the partnership loses his interest. It is a thing which is taken from an expelled partner. It is a thing, therefore, for which it is reasonable that an expelled or retiring partner should be paid. No doubt, by convention between the parties, it could be excluded, and, if the articles had said so, I should not have hesitated for a moment to follow them."

Hall v. Hall, 20 Beav. 139 was cited as to waiver of notice by conduct. It merely decides that in that case notice was waived, and is no authority on the present state of facts. Moreover, its correctness is much doubted in *Steuart v. Gladstone*, p. 653, and declared to be inconsistent with *Hall v. Barrows*, 4 D. J. & S. 150.

In *Hall v. Barrows*, the goodwill was "held to be a distinct subject of value, and as such to be included in any sale or valuation to the surviving partner, but with the qualification that it was not to be valued, on the principle that the surviving partner, if he were not the purchaser, would be restrained from setting up the same description of business."

While in the case we are considering Mead might be at liberty to set up the business of a malster and brewer, it is clear he could not represent that it was in any sense a continuation of the old business.

The difficulty in determining what enters into a good will, and in placing a value upon it, may be illustrated by reference to *Pawsey v. Armstrong*, 18 Ch. D. 698, at p. 709, where Mr. Justice Kay directs "the sale of the business as a going concern" and the "goodwill, if there be any goodwill, as will remain when it is quite understood that the mills and premises, any other exclusive property of Mr. Armstrong, are not to be interfered with and not to be sold, and that Mr. Armstrong will be entirely at liberty, whoever buys, to carry on his business at the mill in his own name, as long as and in such manner as he likes."

If the argument could prevail as advanced on behalf of the defendants, that they were at liberty to continue the business uninterfered with by the plaintiff or Mead, but that Mead still had his share of the good will to do with as he might, the above directions of Mr. Justice Kay would shew what an intangible, indefinable valueless thing would remain to him.

Pearson v. Pearson, in the Court of Appeal, 27 Ch. D. 145, at p. 154, overrules *Labouchere v. Dawson*, L. R. 13 Eq. 322, and decides that when the goodwill has been sold, the vendor may set up the same business next door and solicit the old customers, provided he does not represent he is carrying on the old business.

Cruttwell v. Lye, 17 Ves. 335, is referred to where Lord Eldon said: "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place."

Cotton, L. J., says, p. 155: "Taking goodwill in the sense given by Lord Eldon in *Cruttwell v. Lye* 'the probability that the old customers will resort to the old place,' we find that here the purchaser has a right to the place, and a right to get in the old bills; so the purchaser gets the goodwill as defined by Lord Eldon"—language peculiarly applicable to the present case.

Bluck v. Capstick, 12 Ch. D. 863, was cited as somewhat in point in favour of the defendants. It was there held that "when a partnership is dissolved before its natural expiration in consequence of the misconduct of a partner who has paid a premium, he is not entitled to a return of part of the premium," and if any portion is unpaid will be ordered to pay it.

I do not see that it can in any way assist the defendants. In such a case the erring partner pays, or contracts to pay, a sum of money for the privilege of entering into a partnership. He obtains the privilege, and if, by his misconduct, he renders that privilege of little or no value to himself, it would seem incontrovertibly clear that he could not throw the burden of the loss, or any portion of it, on the partner whom by his misconduct he had injured.

The observations of Vice-Chancellor, Sir John Wickens in *Wilson v. Johnstone*, L. R. 16 Eq., 606, at p. 610, cited in *Bluck v. Capstick*, are more in point. He says, "This Court does not punish people by fining them for acts of immorality in the abstract, nor even fraud in the abstract ; it does not take away their pecuniary rights on that ground. A partner, however erring, does not forfeit his right to share in the assets, although he may have committed every sort of atrocity during the partnership, and there may be a suit by his co-partner which is unavoidable, and cannot be resisted in any way."

The result of the authorities seems to me to be

1. A goodwill, whatever else enters into it, includes the right to carry on business on the old premises, so as to give the advantage of "the probability that the old customers will resort to the old place."

2. A sale of the goodwill prevents the vendor in anywise representing that he is continuing the old business.

3. It is a distinct subject of value—a part of the estate and effects of the partnership, something for which it is reasonable an expelled or retiring partner, should be paid.

4. That misconduct, however grave, will not cause a forfeiture of such right.

5. It may be excluded from the assets by "convention" or agreement ; and may also, by a suit, become the subject of a forfeiture.

On these authorities, and the facts of this case, I am of the opinion :

1. That Mead did not forfeit his interest in the goodwill.

2. That he did agree that the defendants might have it for the purpose of continuing the business ; and that so agreeing he had and has no right to interfere with them in so doing.

3. That both parties are estopped by the proceedings in the Chancery Division ; the plaintiff from denying the right of the defendant to enjoy the assets of the business, and the defendant from setting up a forfeiture under clause three of the partnership deed.

4. That it is the reasonable intendment from what was done at the time of the dissolution; not that the defendants should enjoy the goodwill without paying for it, but that they should pay for it a reasonable sum.

In what proportion or how, as between themselves they are to hold it, I need not determine. If my conclusion is right, they should have provided for that when they entered into their new partnership. If they did not they can no doubt do so now.

I have not forgotten Mr. Moss's argument that the present plaintiff is not entitled to recover, as under the agreement I have found the property passed to O'Keefe & Mead at the time of the dissolution and formation of the new partnership, and Mead had no interest in the goodwill to assign.

This may possibly be so, technically, having reference to the language used in the assignment; but, if so, he had an interest in the value or price to be paid, and there is no reasonable doubt he intended to assign whatever interest he had.

I think there can be no doubt he should be made a party to the record to remove any question as to the validity of the assignment.

As to the value of the goodwill. It is of course impossible to value a goodwill, except in a somewhat arbitrary manner. At least, I find it impossible.

By clause 26 of the deed it is provided that in the event of the death of either Hawke or Mead, the survivor should pay the representatives of the deceased \$12,500 for his share of the goodwill. This is cogent evidence that for the purposes of the business, the goodwill was to be taken as having a fixed and not a fluctuating value; and unless evidence could be adduced that it was really worth less by reason of the business having been injured either by the conduct of Mead or otherwise, I do not see why the value placed upon it by O'Keefe when the deed was signed in April, 1882, should not govern at the time of the dissolution in September, 1883.

In my opinion, therefore, upon the record being amended adding Joseph H. Mead, the plaintiff's motion must be made absolute to enter judgment for the plaintiffs for \$12,500 with costs of suit.

I do not think it is a case for any allowance of interest.

CAMERON, C. J.—Since the argument in this case, I have given the question involved much consideration, but have been unable to arrive at any different conclusion from that reached at the trial. As both my learned brothers differ from that conclusion, I need hardly say, that while I adhere to my first opinion, I do so with much misgiving as to its soundness, not because my own mind is less convinced now than it was at the trial, but from a fear that it ought to be convinced, and that my mind must be obtuse and obdurate in the reception of just impressions.

A perusal of the many cases cited on the argument and considered in the judgment of my learned brothers, just read by learned brother Rose, and concurred in by my learned brother Galt, will demonstrate that these cases do not appear to be all reconcilable in principle, one with the other. But in none of these cases, or many of the others that have come under my observation, do the facts resemble those in this case.

The goodwill which belonged to the old firm of O'Keefe & Co. on the formation of the partnership, out of which the present litigation arises, ceased to be the property, so to designate it, of the business or firm, and became vested by terms of the articles of partnership in two of the members; that is to say, Mr. Mead, through whom the plaintiff claims, and the defendant Hawke—the defendant O'Keefe being declared to have no interest whatever therein—the goodwill that was bought by Mead and the defendant Hawke, was the goodwill of the old firm or business, and the prospective goodwill to be acquired by the new. On a dissolution, then, of the firm, by any means, O'Keefe would not acquire any interest or share in the goodwill or the proceeds of it, if it became necessary to dispose of it.

The first difficulty that strikes me in the way of the plaintiff is, what right can she have to claim anything in respect of the goodwill against O'Keefe, who acquires no interest therein as a right of property, and no benefit except the indirect one arising to him out of the profits of the continued business which, by the terms of the partnership, were secured to him whether the goodwill remained vested in Mead & Hawke, or became wholly vested in one of them under the provision in that respect contained in the articles of partnership.

The next difficulty is, what claim can she have against Hawke in respect of the goodwill when he was the absolute owner of a half of such goodwill, by reason of his purchase of that half from O'Keefe, and was therefore, in the absence of a stipulation in the agreement of dissolution to the contrary, entitled to carry on the business in the name of O'Keefe & Co., and by Mead's express consent in the memorandum of dissolution signed by all the partners.

According to *Lindley* on Partnership, 4th ed., p. 859, "The term goodwill can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. * * When a partnership is dissolved, the question arises, What is to be done with the goodwill? Now it has been just seen that there is no obligation on the part of any of the partners to retire from business merely because the partnership between them is dissolved."

On the other hand, in the case of death, the surviving partner is not under any obligation to carry on the old business, so as to preserve its goodwill until the final winding-up of the partnership affairs. And yet, unless the goodwill is preserved, and unless a person purchasing it can be secured against rivalry on the part of the old partners, it is obvious the goodwill can have little, if any, marketable value. Whatever value, however, it has, must be considered as belonging to the firm, unless there is some agreement to the contrary.

It follows from this, if a firm is dissolved and no agreement has been come to respecting its goodwill, such goodwill must be sold for the benefit of all the partners. In the event of a dissolution by death, it has been said, the goodwill survives. But this is not correct, if it is meant the value of the goodwill, as such belongs to the survivor. It undoubtedly may happen that the survivor may obtain the benefit of the goodwill without paying for it; for he is at liberty, unless restrained by agreement, to continue the business on his own account, and in the name of the firm.

For these propositions the learned author cites *Farr v. Pearce*, 3 Madd. 74; *Davies v. Hodgson*, 25 Beav. 177; *Webster v. Webster*, 3 Swanst. 490; and *Hammond v. Douglas*, 5 Ves. 539; *Smith v. Everett*, 5 Jur. N. S. 1332; *Lewis v. Langdon*, 7 Sim. 421.

There is no doubt, as the law now stands, goodwill is something that may be disposed of or valued, and is deemed to be, where there is nothing in the agreement of the parties to shew a contrary intention, a portion of the assets of a partnership, that on a dissolution of the partnership, each member of the partnership is entitled to share in. But the parties to such a partnership may make any stipulation as to the disposal of such goodwill as they may think fit. In the case under consideration, the parties did make stipulations in regard thereto.

By the 19th clause it is provided, that within six calendar months of the expiration or sooner determination of the said partnership, a full, true, and particular account in writing shall be made, and taken by the said Eugene O'Keefe, Widmer Hawke, and Joseph Hooper Mead of all the stock in trade, moneys, credits and effects, and things then belonging to the said partnership, and a just valuation or appraisement shall be made of all the particulars included in such accounts which are capable of valuation or appraisement, and immediately after such last mentioned account shall have been so taken and settled, the said partners shall pay or make the provision for the payment of the debts owing by the said partnership, and for

meeting all the liabilities thereof. And the balance of the said stock in trade, moneys, credits and effects and other property then belonging to the said partnership, shall be divided among the said Eugene O'Keefe, Widmer Hawke, and Joseph Hooper Mead.

Taking this clause by itself the language is wide enough to cover and include the goodwill. But by clause 20 it is provided, "Whereas it has been agreed by and between the said partners that the said Eugene O'Keefe shall sell and dispose of to the said Widmer Hawke and Joseph Hooper Mead, all his interest in the goodwill of the firm and partnership heretofore existing between him and George Macaulay Hawke, as brewers and malsters, and all his interest in the goodwill of the business to be made and carried on by the partnership hereby formed, which he would be entitled to upon the expiration or sooner determination of this partnership, and in the meantime to fully initiate and instruct the said Widmer Hawke and Joseph Hooper Mead, in the business of brewing. The said Widmer Hawke and Joseph Hooper Mead, in consideration thereof, to pay the said Eugene O'Keefe, on the execution of these articles the sum of twenty-five thousand dollars * * the receipt whereof is hereby acknowledged. These articles, therefore, amongst other things, witness that the said Eugene O'Keefe * * doth hereby grant, bargain, sell, assign, transfer, and set over unto the said Widmer Hawke and Joseph Hooper Mead, and the survivor of them, all the right, title, interest, claim, and demand of him the said Eugene O'Keefe of, into, and out of the goodwill of the business heretofore existing between him, and the said George Macaulay Hawke, carrying on business as brewers and malsters under the name and style of O'Keefe & Company, at the city of Toronto, and, also, in the goodwill of the business, to be made and carried on by the partnership hereby formed." The said O'Keefe further covenanted, at the expiration of the partnership hereby formed, or at the expiration of the new partnership to be formed as hereinafter mentioned, to execute and deliver to

the said Widmer Hawke and to said Joseph Hooper Mead, or to the survivor of them, a good and sufficient deed, assigning and transferring to them all his right, title, and interest in the said goodwill as aforesaid. But in the event of the said Widmer Hawke and Joseph Hooper Mead, or in the event of either of them desiring it, he, the said Eugene O'Keefe will, at the expiration of the partnership hereby formed, enter into a fresh partnership with the said Widmer Hawke and Joseph Hooper Mead, if they both desire it, or in the event of only one of the said Widmer Hawke or Joseph Hooper Mead desiring it or being then alive, with the one so desiring it, or with the survivor for the term of three years after the expiration of the partnership hereby formed on the terms and conditions that the capital brought into such partnership or business, shall not be less than seventy-five thousand dollars, if the three partners be then alive, or desirous to continue business together, or not less than fifty thousand dollars if only two be then alive, or desirous to continue business together.

It is manifest from these provisions that the accounts to be taken by the firm, as provided in clause 19, could not include anything in respect of the goodwill because the whole effects were, after paying the liabilities, to be divided in the proportions mentioned; and, if this were carried out, O'Keefe would be getting twice paid for the goodwill, and the new partnership that has been formed between O'Keefe and Hawke is either strictly in accordance with the agreement of all the parties to the contract of partnership, or is an entirely new co-partnership.

Then, by clause 21, provision is made for the event of death of any of the partners during the partnership, in which case the executor or administrator of the deceased partner shall be entitled to the share of such deceased partner in the capital, stock in trade, moneys, credits and effects of the partnership, and in the net profits of the firm up to the time of death; but in no case should the representatives of the said Eugene O'Keefe be entitled to any

sum whatever in respect of any goodwill of the said Eugene O'Keefe in the said business.

Then, by clause 26, the event of the death of Hawke or Mead, before the expiration of the term, is provided for, and in that event the survivor is to pay the executors or administrators of the deceased, in addition to what they would be entitled to under clause 21—\$12,500 which shall be taken among other things in full of the goodwill bought from O'Keefe.

By clause 27, the dissolution of the partnership before the expiration of the period of three years is provided for, whether it happen by reason of the death of one of the partners, or retirement under clause two, or being compelled to leave the firm under article number three. If the partner dying, retiring, or compelled to leave the firm, be O'Keefe, then the other two may carry on the business, and share equally in the profits and losses. But if the party dying, retiring, or being compelled to leave the firm, be either Hawke or Mead, then it was agreed that the said partnership should be continued until the expiry of the said term of three years. If Hawke died, retired, or was expelled, Mead was to have the option of buying Hawke's interest in the capital, stock, and assets of the firm, and then during the residue of three years he should be entitled to one-half the profits, and be liable for one-half the losses. If Mead died, retired, or was expelled, Hawke had the option of buying his interest with like interest and liability.

Thus by the agreement of the parties what is to become of the goodwill is provided for; and I am of opinion it is only under the terms of the agreement of the parties, where special provisions are made in relation to goodwill, that the rights of the parties can be dealt with.

In the absence of any provision in the agreement of the parties, the law will direct that the goodwill shall be dealt with in the winding-up of the partnership in the same manner as any other asset or effect of the firm. In carrying on the business to which the goodwill attaches,

the defendants, O'Keefe and Hawke, are, if it is the same business, acting in accordance with the express stipulations contained in the articles of co-partnership, and the law cannot attach to the performance of these stipulations an obligation on the retiring partner, whether by expulsion or otherwise, which the parties themselves have not agreed to. If the defendants are not carrying on the business under the terms of the contract of partnership, then no equity attaches on them to account to the plaintiff in respect of the goodwill; and if the plaintiff has any remedy it would be to restrain the use by the defendants of the name O'Keefe & Co. But it is quite clear the plaintiff could not do that. O'Keefe alone might be restrained, if he were using the name not in conjunction with Hawke. I am also of opinion, Mead, by his conduct, forfeited his right to goodwill by the express terms of clause 29.

It is not necessary to question [the rule of law that forfeitures can only be worked by the observance strictly of the things required to create the forfeiture. That rule applies where the right does not depend upon the conduct of the party prejudiced, but upon the will of him who desires the forfeiture, upon his doing certain things that it is stipulated shall be done before he can claim the forfeiture. Where that is the case what is required to be done must be done strictly. But where a partner in a business misconducts himself in a manner that entitles his co-partners to expel him from the partnership upon their giving him a particular notice, and he consents to go out without requiring the notice, if the cause exists in fact, that would deprive him of a right, if such notice were given. I am of opinion he cannot be heard to say, after he has gone out, that he has not lost the right.

I quite agree in what was said by Wickens, Vice-Chancellor, in *Wilson v. Johnston*, L. R. 16 Eq. 606, at p. 610: "The Court does not punish people by fining them for acts of immorality in the abstract, nor even fraud in the abstract; it does not take away their pecuniary rights on that ground. A partner, however erring, does

not forfeit his right to share in the assets, although he may have committed every sort of atrocity during the partnership, and there may be a suit by his co-partner which is unavoidable, and cannot be resisted in any way. However fraudulent or however bad he may have been, he does not by that, merely, forfeit a right to share in the partnership assets."

But where there is an express stipulation, as there was in the articles of partnership now under consideration, that the doing of certain things should enable the inoffending partners to determine the partnership, and it is determined for the enabling cause, and such conduct, also by express terms of the contract works a forfeiture of a mere equitable right, and the offending partner submits to a dissolution of the partnership, and consents to his co-partners continuing the business, it shocks one's common sense to think that a Court of Equity would enable him to avoid the stipulated consequences of his misconduct, and probably seriously embarrass the business that he consented his co-partners should carry on, by giving him the right to claim that creature of equity of doubtful and uncertain deforcement, called goodwill, on the ground that the form had not been observed of giving notice in writing of the intention to enforce the right to determine the partnership, when such intention was made known to him in the most clear and explicit manner possible.

I fear that it is difficult to overlook the fact that Mead paid for his admission into the business the very considerable sum of \$12,500, and there is a struggle to prevent the seeming injustice of depriving him of so large a sum. But he can, as against the defendant O'Keefe, have no possible claim to that sum. It was not paid solely for goodwill but for the instruction in the art and mystery of brewing and malting to be given by O'Keefe. The instruction was given, as far as Mead was willing to receive it, and he enjoyed the advantages of the business for a considerable portion of the time. The carrying on of the business too, in the name of O'Keefe & Co., was a right that pertained

to the defendants, and they could not be restrained from doing so. And after Mead left the firm he could have no interest in the renewed term, and his right would be terminated by his share of the value of the goodwill for the residue of the first term of three years.

GALT, J., concurred with ROSE, J.

[QUEEN'S BENCH DIVISION.]

REGINA V. SANDERSON.

Coroner—Evidence--Discrediting witness at inquest—R. S. C. ch. 174, sec. 234—County Attorney—Right to enter jury room.

At a coroner's inquest evidence is properly receivable under R. S. C. ch. 174 sec. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment the improper reception of evidence is no ground for a *certiorari* to bring up the coroner's inquisition. *Regina v. Ingham*, 5 B. & S. at p. 260, specially referred to.

It is not improper for the county attorney acting for the prosecution to enter the jury room, with the consent of the coroner, after the jury have reached a conclusion, where the object of the county attorney is to advise the jury as to the proper language to be employed in order to draw their verdict after it has been arrived at.

UPON the return of the writ of *habeas corpus* in this case, with the warrant of commitment of the coroner, and the return of the gaoler of the county of Wellington attached, and upon which writ there was indorsed a consent dispensing with the production of the body of the prisoner, James Sanderson, signed by his counsel, and upon filing the same and the writ of *certiorari* with the inquisition and depositions thereto annexed, together with the return of the County Crown Attorney for the county of Wellington, J. D. Murphy, for the prisoner, moved to quash the inquisition under which the prisoner was found guilty of manslaughter by causing the death of Henry Torrance, and to discharge the prisoner from custody on the grounds: (1st)

Because it was not shown that the Henry Torrance whom by the verdict of the jury the prisoner was charged with killing was the Henry Torrance upon whose body the inquisition was held. (2nd) Upon the ground that H. W. Peterson the County Crown Attorney was allowed access to the jury-room after the jury had retired to consider their verdict. (3rd) Because evidence to contradict the witness Charles Sanderson should not have been allowed, and that without such evidence in contradiction there was no evidence upon which the jury could have found a verdict against the prisoner. (4th) Because the coroner allowed the verdict of the jury to be changed after it had been rendered.

The inquisition stated that it was "taken at Belwood in the county of Wellington, on the 18th of November, 1887, before John George Mernier, coroner of said county, upon view of the body of Henry Torrance then and there lying dead." The verdict of the jury, as set out in the inquisition, was: "The jury having considered the cause of the death of the said Henry Torrance, find that the same was caused by a gun shot at the hands of James Sanderson, and that the said James Sanderson, on the 27th day of October, did feloniously kill and slay one Henry Torrance."

E. F. B. Johnston, Deputy Attorney-General, shewed cause.

December 16, 1887. *MACMAHON, J.*—What is meant in the ground first taken is, that there is uncertainty in the verdict; but there is no uncertainty in the language used in this finding, as the Henry Torrance the prisoner is found guilty of having unlawfully killed, is the Henry Torrance upon whose body the inquest was held.

In support of the second, third and fourth grounds upon which the inquisition was sought to be quashed, were filed the affidavits of John D. Murphy (who acted as counsel for the prisoner during the coroner's inquest,) and George W. Hazleton, a newspaper reporter, who was present at the inquest.

Although Mr. Peterson, the County Crown Attorney, did enter the jury-room while the jury were assembled, and before the delivery of their verdict, the affidavit of Mr. Peterson discloses that he did not enter the jury-room until after the jury had reached a conclusion, and were prepared to deliver their verdict ; and that he was desired by the foreman to enter the jury-room (which he did in the presence of the coroner) to inform the jury as to the proper language to be employed in order to render a verdict of manslaughter. There was no misconduct on the part of the coroner or jury in this, and it cannot be relied upon as a ground for quashing the inquisition.

As to the third ground, it appears that Charles Sanderson, a brother of the accused, was called as a witness and gave evidence at the inquest as to the circumstances connected with the shooting of Henry Torrance, and being asked during his examination if he did not make to Michael Coulson, James Lawry and Sarah Lawry, at another time, statements different from the one he was then giving under oath as to the circumstances of the shooting of Torrance, and having denied making such statements to the parties named, Michael Coulson, James Lawry, and Sarah Lawry were called to contradict him. Under 32 & 33 Vic. ch. 29, sec. 68, (D.), (R. S. C. ch. 174, sec. 234), this evidence was, by leave of the Court, receivable, and the advantage of the rule permitting its admission, was strongly exemplified in the taking of the evidence during this inquisition. But independently of the enactment referred to, Cockburn, C. J., in *Regina v. Ingham*, 5 B. & S., at p. 260, asked : "Has the Court ever taken upon itself to quash a coroner's inquisition for the improper reception of evidence ? He receives the evidence in the exercise of his judicial functions."

The case of *Regina v. Ingham* is an important authority as showing in what cases a *certiorari* should not issue to bring up a coroner's inquisition. (1st) It is no ground for a *certiorari* to bring up a coroner's inquisition that evidence not upon oath has been received. (2nd) Or that the direc-

tion of the coroner to the jury was improper. (3rd) Or that there was no evidence to warrant the finding of the jury.

There is nothing whatever to support the fourth ground of the motion to quash. The finding of the jury forms a part of the inquisition, and no change or alteration has been made in the verdict of the jury as appears by the inquisition returned ; and immediately following the verdict are the signatures of the jury showing that the verdict as embodied in the inquisition was assented to by them.

The order to quash the inquisition is therefore refused.

If notice is given to the Crown of an intention to apply to have the prisoner bailed, that may be entertained as a separate application.

Motion dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. ATKINSON.

*Canada Temperance Act—Police Magistrate—Appointment of more than one for County—Evidence of—Conviction, validity of—
R. S. C. ch. 106, sec. 17.*

An information was laid before K., who described himself as “one of Her Majesty’s Police Magistrates in and for the County of Oxford; and he was similarly described in the summons and conviction. K.’s commission was issued on the 12th January, and appointed him police magistrate in and for the County of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had, at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed was the case here; and therefore K. could not be police magistrate for the county which included these towns, as there could not be more than one police magistrate for the same county. On motion to quash the conviction,

Held, that the application must be refused: that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise: that even if there was more than one police magistrate, the other might have been appointed subsequently to K.; and the appointment of such other, and not K., would be void; and under R. S. C. ch. 106, sec. 17, the conviction must be deemed sufficient.

CONVICTION under the Canada Temperance Act.

On 9th September, 1887, an order *nisi* was obtained calling upon Jared Kilborn to shew cause why the conviction of James Atkinson, on the information and complaint of W. G. McKay, &c., should not be quashed on the following grounds, among others:

1. The style and authority of the convicting magistrate as self-recited in the proceedings, show no jurisdiction to entertain or convict for the offence charged.

2. Where more than one police magistrate for a county, supposing either a jurisdiction territorially in common, or a jurisdiction with different limits, the offence should have been enquired into and adjudicated upon by two justices of the peace.

3. There could not be such territorial jurisdiction in common.

The commission to Jared Kilborn, was issued on the 12th January, 1887, and appointed him “Police Magistrate

in and for the said county of Oxford," &c., "to have, hold, occupy, possess, and enjoy, during our pleasure or your residence within the said Province of Ontario, together with all the rights, privileges, emoluments, fees, and perquisites which to the said office belong or of right appertain.'

The information stated that it was laid "before me, Jared Kilborn, one of Her Majesty's police magistrates in and for the county of Oxford;" and charged that the defendant "on or before the 12th day of March, 1887, at the township of Blenheim, in the county of Oxford," &c., "unlawfully did sell intoxicating liquor," &c.

The summons was, that "information hath this day been laid before the undersigned Jared Kilborn, one of Her Majesty's police magistrates, in and for the county of Oxford, for that you "on or about the 12th March, A. D., 1887, at the township of Blenheim, in the county of Oxford," &c., "unlawfully did sell intoxicating liquor," &c., setting out the offence as in the information. "These are, therefore to command you in Her Majesty's name to be and appear on Monday the 30th day of May, 1887, at half past two o'clock in the afternoon, at the town hall, Drumbo, in the township of Blenheim, aforesaid, before me or such justices of the peace for the said county, as may then be there, to answer to the said information, and to be further dealt with according to law."

The charge was heard before the said Jared Kilborn, and the defendant was convicted.

The conviction was that the defendant on the 6th June, 1887, at Drumbo, in the township of Blenheim, in the said county of Oxford, hotel-keeper, is convicted before the undersigned, one of Her Majesty's police magistrates, in and for the said county, for that he, the said James Atkinson, setting out the offence, &c., in like manner as in the summons, &c. The conviction was signed by "Jared Kilborn, P. M."

September 16, 1887.—*V. McKenzie*, Q.C., for the defendant, moved absolute the order *nisi*.

Delamere, for the Crown, contra.

September 27, 1887. WILSON, C. J.—The facts are, the information was laid before Jared Kilborn, who describes himself as “one of Her Majesty’s police magistrates in and for the county of Oxford;” and the summons and conviction give him the like description.

The commission to him was issued on the 12th January, 1887; and it appoints him police magistrate for the county of Oxford.

Woodstock and Ingersoll, are two towns in the county; and it is said the population of each is, and was at the time of this complaint, more than 5,000, so as to have, by law, each, a police magistrate: R. S. O. ch. 72, sec. 1; and it must therefore be presumed there was at the time of these proceedings a police magistrate in and for each of such towns; and, if so, the police magistrate who was appointed for the county, cannot be such magistrate for the county, which includes these two towns, as there cannot be more than one police magistrate for the same place.

I do not know judicially that either Woodstock or Ingersoll contains a population of more than 5,000; and I have no other knowledge of it by affidavit or otherwise.

But it is said Kilborn describes himself as one of the police magistrates for the county, and there cannot be more than one for the same place.

The R. S. O. ch. 72, sec. 1, says, “Every city and every town having more than 5,000 inhabitants, shall have a police magistrate.” Sec. 2 says, “Every other town may, if the Lieutenant-Governor-in-Council sees fit * * have a police magistrate.”

And the other provisions of that Act, and of 41 Vic. ch. 4, (O.), and 48 Vic. ch. 17, (O.), seem to authorize the appointment of only one police magistrate for the same county. And the 50 Vic. ch. 11, (O.), which authorizes more police magistrates than one to be appointed for any county, did not come into operation until the 23rd of April last.

It may be, however, that there was in fact more than one police magistrate for the county than the one who

acted in this case, but that other may have been appointed subsequently to the appointment of the one who convicted the defendant; and it would be the appointment of that other, which would be void, and not the appointment of the one who made this conviction; and considering the provisions of the R. S. C. ch. 106, sec. 117, which declares that no conviction shall be held insufficient or invalid by reason of any defect in form or substance, if it can be understood from such conviction that the same was made for an offence against some provision of the Act within the jurisdiction of the parties who convicted; and if there is evidence to prove such offence, and if no unauthorized penalty is imposed, I ought not to avoid the conviction. It is true the general rule is, that no presumption is made that one who is acting under a limited authority, has acted within that authority without an assertion and proof that he has acted within his jurisdiction.

But this enactment says the conviction shall be valid notwithstanding any defect in form or substance, *if it can be understood* (among other things which are not in question) that the offence was one within the jurisdiction of the justices who convicted; and I understand from the exception taken—and I am trying the case upon the merits also—that it is not asserted there is any other police magistrate for the county than the one who convicted, unless there are police magistrates for the towns of Woodstock and Ingersoll; but it has not been shewn there are such police magistrates in fact; nor has it been shewn that by reason of their respective population, they are entitled each of them to have a police magistrate.

In my opinion that objection therefore fails.

It was argued also that the summons was invalid because it required the defendant to appear before the police, magistrate, "or such justices of the peace for the said county as may then be there, to answer to the said information."

The police magistrate who issued the summons, was himself present to hear and did hear the complaint; and

the defendant appeared there also, and pleaded not guilty ; and under the R. S. C. ch. 106, sec. 117, and other sections, that is not an invalid or incurable defect, as I have held in the case of *Regina v. Durnion*, (14 O. R. 672), on which I gave judgment at the present sittings.

There is no valid objection to The Canada Temperance Act being in force in this case, for the complaint was made on the 25th of May, of an offence having been committed on the 12th of March, and the R. S. C. ch. 106 was in force on the 1st March, and the proper title of that Act has been given to it in all these proceedings, and the proceedings were carried on under it alone. There is no such objection here as was made in the case of *Regina v. Durnion*.

I dismiss this motion, with costs to be paid by the defendant.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

REGINA V. CAMERON.

Canada Temperance Act, R. S. C. ch. 106, sec. 100—Power of justice to inflict greater penalty than \$50—Reasonable discretion.

Under the Canada Temperance Act, sec. 100, convicting justices may inflict a reasonable penalty in excess of \$50.

Remarks as to their discretion in so doing.

A penalty of \$60 allowed to stand.

MOTION to quash a conviction under the Canada Temperance Act, on the ground mentioned in the judgment.

Douglas, for the motion.

Delamere, contra.

January 3, 1888. ROSE, J.—This was a motion to quash a conviction under the Canada Temperance Act, on the ground that the magistrate had exceeded his jurisdiction in fixing the penalty at \$60 for the first offence; the contention being that the amount is limited by the statute to \$50 for the first and \$100 for the second offence.

The words of the Act sec. 100, ch. 106, R. S. C., (41 Vic. ch. 16 sec. 100) are, "shall on summary conviction be liable to a penalty of *not less than* \$50 for the first and *not less than* \$100 for the second offence, and to imprisonment for a term *not exceeding* two months for the third and every subsequent offence."

Counsel have not referred me to any authority upon which I can rely, and I have been unable to find any directly in point.

If the words are to be taken as they read, then the upward limit of the fine is within the discretion of the magistrate; and I would be unable to say, that naming \$60 is such an unwise exercise of the discretionary power as calls for the interference of this Court. I propose, if possible, to take my rule of interpretation from the language of the Act itself.

Sec. 99, the first section of the second part of the Act, headed "Prohibition of Traffic in Intoxicating Liquors," permits sales by druggists "in quantities of *not less* than one pint;" by distillers "in quantities not less than ten gallons;" and as to all others "not less than eight gallons."

Sub-sec. 7 provides for certain sales "in quantities of not less than ten gallons at one time, except when sold for sacramental purposes."

I find in various clauses a discretionary power vested in the Court or magistrate, within certain limits, and again limited by a sum not to be exceeded in an upward direction, and elsewhere I find the penalty fixed.

Sec. 82 provides for "a penalty not exceeding \$200" and imprisonment for a term not exceeding 6 months; sec. 83, a "penalty of \$200;" sec. 87, "a penal sum not exceeding \$500."

Sec. 85. "A fine not exceeding \$500, or to imprisonment for any term not exceeding six months."

Sec. 88. "Shall be imprisoned * * for any term less than two years."

Sec. 73. "A fine not exceeding \$100, or to imprisonment not exceeding three months."

Sec. 74. "A penalty of \$100, and to imprisonment for a term not exceeding six months."

Could there be a greater variety of provisions? In view of such varied provisions, and the language used in sec. 100, I find myself unable to do otherwise than read the words as I find them.

It was contended that "not less than \$50" was equivalent to naming \$50 as the amount of the penalty; in other words, that the words, "not less than," were surplusage.

I find, however, when the framers of the Act desired to name a fixed sum, they used apt words to convey their meaning, "a penalty of:" see secs. 74 and 83; and when an upward limit was desired, the language used in secs. 82, 83, 73, is employed, "not exceeding;" and when they desired to indicate that a discretion might be exercised in what I may call a downward direction, the language of sec. 88 is found—"for any term less than two years."

I am, therefore, driven to the conclusion that when they fixed the downward limit at \$50, and did not fix any upward limit, they must have intended to leave the amount of the fine or penalty to the discretion of the convicting justice, such discretion to be held in check, it may be, by the Court, or if not, by Parliament, on the motion of any member of the House. And I am the less able to resist this conclusion when I find in the preceding section the same language employed, "not less than," in its ordinary signification.

I feel I cannot say that in sec. 99 "not less than" means what the words imply, and in sec. 100 means nothing, that is, has no meaning; nor can I say that "not less than \$50" has the same meaning as "not less nor more than \$50."

Mr. Douglas, since the argument, has handed in a reference to *Regina v. Black*, 43 U. C. R. at p. 192, in which the late C. J. Harrison raises the question of the meaning of "not less than \$40," but does not give any answer.

He also referred me to *Regina v. Doyle*, 12 O. R. at p. 357, where Wilson, C. J., refers to the language of the Act as if the penalty were fixed; but I can hardly accept the judgment as going so far, especially as the point now raised was not there for consideration.

Nor am I able to rely upon the case of *Regina v. Rose*, 23 S. C. R. N. B. p. 309, where counsel for the Crown conceded that the words "not less than \$100," did not warrant the imposition of a greater amount, as no reason or argument was stated upon which the admission was made.

The discretion to be exercised must be a reasonable one, and I venture to suggest that the magistrates may well accept the sums named in the Act as those which were designed to be named as the penalties under the Act.

Very possibly the framers of the Act were more careful to prevent trifling penalties being awarded than to guard against excessive ones, not doubting that the magistracy would not harshly exercise the discretion vested in it, but not so certain that an unwise sentiment of kindness might not prevent the imposition of substantial penalties.

The principles of Magna Charta teach all judicial officers that the discretion vested in them is not an arbitrary power, but one to be exercised in accordance with sound sense, and to promote justice. To cite from a most interesting report of the case of *William, Earl of Devonshire*, on an information in the King's Bench for assaulting Col. Culpepper in the King's Palace, 3 James II., A. D. 1687, found in vol. xi. State Trials, p. 1353, at p. 1361: "The law has for the most part left fines to the discretion of the Judges; yet it is to be such a discretion as is defined by Lord Coke, fol. 56: '*discretio est discernere per legem quid sit justum*'; not to proceed according to their own will and private affection, for '*talis discretio discretionem confundit*,' as Wingate says, fol. 201."

In that case the discretion of the Judges in inflicting a fine of £30,000, said to equal in our times, say £150,000, was considered and interfered with.

The report is most interesting, as is also the history of the case by Lord Macaulay, 10th ed., vol. ii., pp. 246-50.

On the whole, I am of the opinion that the motion fails and must be dismissed, with costs.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

BOOK ET AL V. BOOK.

Probate—Validity of—Right to question.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will.

Held, on demurrer, that the defence was bad : that when it is desired to attack the validity of a probate, issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the Court.

Irwin v. Bank of Montreal, 38 U. C. R. 375 followed.

Quære, whether the application must be to the Surrogate Court or not.

THIS was an action brought by the plaintiffs, as executors, under the last will and testament of Maria Book, late of the Township of Onondaga, in the County of Brant, deceased, on the covenants contained in two mortgages on certain lands, made by the defendant to the testatrix Maria Book, whereby the defendant covenanted to pay the mortgage money and interest, alleging default, &c.

The statement of claim alleged that the will was duly proved in the Surrogate Court of the County of Brant by the said plaintiff, &c., being the proper Court in that behalf.

The statement of defence alleged—

1. The defendant does not admit the allegations made by the plaintiffs ; but says that if the plaintiffs had obtained probate of what may purport to be the will of Maria Book, they obtained such probate *ex parte*, and in common form, without notice to the defendant or others interested therein, and not in solemn form, and not upon evidence given *vivâ voce* or subject to cross-examination ; and the said will has not been established by the Court of Chancery or High Court of Justice ; and the defendant was not aware, until after the commencement of this action, that the plaintiff had applied for or obtained probate of such will ; and such probate is not binding upon the defendant, who is a

son and one of the heirs at law, and next of kin of the said Maria Book.

2. Denial that the will was duly executed according to law: that testatrix did not subscribe or acknowledge her name in the presence of witnesses, and did not request the witnesses to attest the same, and the witnesses did not subscribe their names and attest said will in the presence of testatrix; and said will was not otherwise executed according to law.

3. Setting up that testatrix, with plaintiffs' knowledge, was not of sound and disposing mind, memory or understanding, and not possessed of sufficient mental capacity to make a will.

4. That undue influence was used on the testatrix to make the will.

5. That under the circumstances it was the duty of the plaintiffs, either not to apply for probate, or to have proved the same in solemn form, upon *viva voce* evidence, on notice to all parties interested; or to establish the will by an action in this Court before acting under said will, &c.

6. The defendant, knowing that others of the said children denied the validity of the said will, applied (without prejudice) to the plaintiffs to settle this action, in so far as the defendant was liable upon the mortgages sued upon, and to indemnify defendant against the invalidity of said will, and of the authority of the plaintiffs; and to undertake to return to defendant any money he might pay to the plaintiffs in this action, in the event of the said will being afterwards set aside, or declared invalid, at the instance of any other person interested therein, but the plaintiffs refused to do so; and the defendant prayed that all proceedings should be stayed until probate of the will shall have been obtained in solemn form or established by this Court.

The plaintiffs demurred to the said paragraphs of the said statement of defence, on the grounds: that so long as the probate of the will of which the plaintiffs are executors remains unrevoked, the plaintiffs are entitled to maintain this action, notwithstanding the allegations in the said

paragraphs, which shew no defence to this action, and the truth of which cannot be enquired into in this action; and on other grounds sufficient in law to sustain the demurrer.

On November 5, 1887, the demurrer was argued.

Lash, Q. C., in support of the demurrer.

Moss, Q. C., contra.

November 5, 1887. ROSE, J.—I think the demurrer must be allowed. If the defendant has the right to attack the probate he must do so in an independent proceeding with the proper parties before the Court. I do not say whether the application should be before the Surrogate Court or not. I think, however, the statement of defence offers no effectual bar to the plaintiffs' recovery in this action.

The question seems to me concluded by the language of Wilson, C. J., in *Irwin v. Bank of Montreal*, 38 U. C. R. 375, at pp. 387, 389.

He there determines that the grant of administration is a proceeding *in rem*, constituting the person therein named administrator, whose position as such cannot be questioned while it stands, if the Court had jurisdiction, and if the person on whose supposed death the administration has been issued be really dead; and further that the grant operating *in rem*, and the Act being valid as a judicial Act until revoked, the general law is, that the grant, although obtained by fraud, retains its validity until it is revoked by some express judicial act declaring it void.

Costs in the cause to the plaintiffs in any event.

Judgment for the plaintiffs.

[COMMON PLEAS DIVISION.]

BUSH ET AL. V. FRY ET AL.

Replevin—Obtaining goods under false pretences—Factor's Act, R. S. O. ch. 121 secs. 2, 4, 5—Agent "Entrusted"—Sale of goods—Property passing.

F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F., simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F., on payment of the freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was shipped by F. to Virginia City, Ill., and from there to F. at Toronto, under the assumed name of R., and was there pledged by F. under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by D. to pay the charges as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied.

Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him.

Held also, that F. was not an agent within the meaning of the Factor's Act, R. S. O. ch. 121, secs. 2, 4, 5, so as to enable him to pledge the piano; nor, per ROSE, J., was he an agent "entrusted with the possession of goods."

THIS was an action of replevin, brought by the plaintiffs to recover a piano.

The action was tried before ROSE, J., without a jury, at Toronto, at the Spring Assizes of 1887, when judgment was entered for the plaintiffs.

The facts sufficiently appear from the judgments.

During Michaelmas Sittings *Urquhart* moved, on notice, for an order to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendants.

During the same Sittings, December 5, 1887, *Urquhart* supported the motion, and referred to *Chitty* on Contracts, 10th ed., 204; *Vickers v. Herts*, L. R. 2 Sc. App. 113; *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 284; *Moyce v. Newington*, 4 Q. B. D. 32; *Nixon v. Brown*, 57

N. H. 34; R. S. O. ch. 121; *Baines v. Swainson*, 4 B. & S. 270; *Sheppard v. Union Bank of London*, 7 H. & N. 661; *Benjamin* on Sales, 3rd ed., 161; *Heyman v. Flewker*, 13 C. B. N. S. 519.

A. Macdougall and *Wallace Nesbitt*, contra, referred to *Kennedy v. Green*, 3 My. & K. 699, 713; *Blackburn* on Sales (Blackstone ed.), p. 306, 312, 313; *Fuentes v. Montis*, L. R. 3 C. P. 268, 277, 280, 284, L. R. 4 C. P. 93; *Benjamin* on Sales, 4th Am. ed., sec. 879; *City Bank v. Barrow*, 5 App. Cas. 664, 678; *Bank of Hamilton v. Noye Manufacturing Co.*, 9 O. R. 631; *Re Monteith*, 10 O. R. 529; *South Australasian Ins. Co. v. Randell*, L. R. 3 C. P. 101; *Broadbent v. Barlow*, 7 Jur. N. S. 478, 30 L. J. N. S. Ch. 569.

December 23, 1887. MACMAHON, J.—It was admitted that the defendant Fry wrote a letter, on the 9th of December, 1886, from Beardstown, in the State of Illinois, to Kline & Co., at Chicago, stating he had a customer, named Thomas Johnston, to whom he could sell a piano, and desiring them to ship one in their own name, he (Fry) simply acting as their agent; the piano to be subject to Kline & Co.'s orders, Fry agreeing to pay the freight charges both ways in case of no sale. Kline & Co., not having in stock the style of piano required by Fry, handed the latter's letter to the plaintiffs, piano manufacturers in Chicago, who communicated with Fry, and as a result a piano was shipped by the plaintiffs to Beardstown, consigned to their own order, the plaintiffs authorizing the railway company to deliver the piano to Fry on his paying the freight charges.

On the 5th January, 1887, Fry informed the plaintiffs by letter that the piano had been received.

It was also admitted that the piano in question was shipped by the defendant Fry from Beardstown to Virginia City, Illinois, and from Virginia City to Toronto, on the 7th of January, addressed to J. G. Robbledean, which was a fictitious address.

Fry, who on reaching Toronto assumed the name of

J. G. Robbledean, obtained from one Green, the proprietor of the Simcoe House, an hotel at which he was stopping, advances sufficient to pay the duties and freight; and the piano was then removed from the Grand Trunk freight sheds to the Simcoe house on the 21st of January, and was while there subject to a lien for the advances made by Green. Fry (*alias* Robbledean) requested the defendant Day, a pawn-broker in Toronto, to make a loan to him, on a pledge of the piano, the amount of the loan being to pay off the amount advanced by Green, as well as a further advance by Day; Fry, representing at the time he applied for the loan, that he intended opening an agency in Toronto for the sale of pianos. The amount the defendant Day advanced to Fry on the pledge of the piano was \$176.50, and he removed the piano to his premises, where it remained until replevied by the plaintiffs.

The plaintiffs were treating with Fry on the basis of his letter to Kline & Co.; and, if so, they did not intend that the property in the piano should pass to Fry. In fact, under the circumstances of this letter, no property could pass to him, as Fry was not representing himself as desiring to purchase, but as only wishing to act as an agent, undertaking in the event of there being no sale to Thomas Johnston, mentioned in the letter, to return the piano free of charge to the plaintiffs at Chicago. His shipping the piano to Toronto was a fraud upon the plaintiffs, and his possession here was fraudulent as against them.

The case of *Higgons v. Burton*, 26 L. J. N. S. Ex. 342, was referred to by Lord Hatherley, in *Cundy v. Lindsay*, 3 App. Cas. 459, at p. 468, where he says: "There, one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and, having concealed that dismissal, continued to obtain goods from him as still acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever *who had purchased the goods*. The goods,

if they had been purchased at all, had been purchased by the firm for which this man had acted as agent; but he had been dismissed from the agency—there was no contract, therefore, with the firm; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, the circumstance occurred that an innocent person purchasing the goods from the person with whom there was no contract, was obliged to submit to his loss. The point of the case is put so very shortly by Chief Baron Pollock, that I cannot do better than adopt his reasoning: ‘There was no sale at all, but a mere obtaining of goods by false pretences; the property, therefore, did not pass out of the plaintiffs.’”

Fry did not desire to buy, and the plaintiffs were not asked to sell to him; there was therefore no contract with him; and as a consequence the property did not pass out of the plaintiffs. So that, although the defendant Day is an innocent pledgee, yet having obtained the pledge from a person with whom there was no contract, he must submit to his loss unless he can shew that Fry, the pledgor, was in possession of the goods in some other capacity enabling him to make a valid pledge.

It was strenuously urged by Mr. Urquhart, on behalf of the defendant Fry, that, even if there was no contract between the plaintiffs and Fry, the latter was an agent within the meaning of the Factor's Act, and could therefore pledge the piano.

The question then to be considered is, whether Fry, under the Factor's Act, R. S. O. ch. 121, secs. 2, 4, 5, was an “agent entrusted with the possession of goods * * so as to give validity to any contract or agreement by way of pledge, lien, or security *bond fide* made with such agent * * in respect thereof.”

The piano was unquestionably sent to Fry as an agent; but as a special agent and for a particular purpose—for the purpose of enabling him to effect a sale to Johnston—

and if a sale to Johnston was not effected, then the agency terminated, and the piano was to be returned to the plaintiffs.

The meaning of the term "agent," under 6 Geo. IV. ch. 94 and 5 & 6 Vic. ch. 39, sec. 4, (from which our Factor's Act, R. S. O. ch. 121 is taken) received judicial interpretation in *Heyman v. Flewker*, 13 C. B. N. S. 519, at pp. 527-8, where Willes, J., in giving the judgment of the Court, after referring to the cases cited during the argument, as to who might or might not be considered as agents within the meaning of these enactments, says: "All that these cases decide applicable to the present purpose, may be stated thus,—that the term 'agent,' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like, that class (factors) from which the Act has taken its name."

In *City Bank v. Barrow*, 5 App. Cas. 664, the House of Lords, in the judgment delivered by the Lord Chancellor, at p. 674, adopts the summing up of the authorities by Willes, J., in *Heyman v. Flewker*, contained in the paragraph above quoted, as being the proper interpretation to be applied to the term "agent" in the Factor's Act.

It appears that Fry was, while in Beardstown, a music teacher, being known in no other capacity; and the first and only transaction he ever had with the plaintiffs was in respect to this piano. He does not come within the designation of an "agent" under the Factor's Act, as formulated by Willes, J., and approved by the House of Lords, as he was not a person whose employment corresponded to that of some known kind of commercial agent like the class of factors. If not such a person, then it could not be successfully asserted by the defendant Day that Fry was an agent entrusted with the possession of goods which he could pledge under the Factor's Act.

On none of the grounds taken can the defendant Day resist the plaintiffs' title to the piano.

During the argument, the case of *Sheppard v. Union Bank of London*, 7 H. & N. 661, was referred to; and although the judgment was on demurrer, it appeared an authority in favor of the defendant Day. But upon its being cited by counsel in *Baines v. Swainson*, 4 B. & S. 270, Blackburn, J., at p. 277, said, it was "no authority as to the description of agency which brings a case within the Factor's Act."

The judgment of the learned Judge who tried this case, must be affirmed, and the motion dismissed, with costs.

ROSE, J.—I agree that the property did not pass, and that Fry was not an agent within the Factor's Act, nor, in my opinion, was he "entrusted."

I merely desire to add the statement by Lord Blackburn in *City Bank v. Barrow*, 5 App. Cas., at p. 678, referred to by my learned brother, of the result of the decision in *Cole v. North Western Bank*, L. R. 9 C. P. 470, 10 C. P. 354, viz., "that an agent who can pledge or sell, must be an agent of that class which, like factors, * * have a business, which, when carried to its legitimate result, would properly end in selling or receiving payment for goods. That would be a kind of class; factors, and agents in the class of factors. If such a person is 'entrusted,' and is entrusted in that capacity, then, in the absence of bad faith on the part of the pledgee, the pledge is good."

The plaintiffs are therefore entitled to retain their judgment.

GALT, C. J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

COCHRANE V. THE HAMILTON PROVIDENT LOAN SOCIETY.

Estoppel—Former action of ejectment—Judgment for default of defence.

Action for breach of an agreement made between plaintiff as mortgagor and defendants as mortgagees, whereby in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage, &c., one year from 1st of April, 1882. The defence was that on 17th June 1882, the now defendants brought ejectment against the now plaintiff, setting up that by such mortgage on default of payment of the mortgage moneys the now defendants should be entitled to take possession of said lands; alleging default, and by reason thereof the now defendants claimed possession: that the now plaintiff did not plead any defence to the action; and for default of any defence on 30th September, judgment for possession was recovered.

Held, that the judgment so recovered estopped the now plaintiff from maintaining the present action.

THIS was an action tried at the Spring Assizes, 1887, at Peterborough, before Mr. Justice O'Connor and a jury, and resulted in a judgment for plaintiff on the findings of the jury.

The action was brought to recover damages for an alleged breach of agreement between the plaintiff, as mortgagor, and the defendants, as mortgagees of a certain farm, under which agreement, as the statement of claim set out, the defendant society "promised and agreed to and with the plaintiff, that if the plaintiff would give to the defendants a chattel mortgage on certain property on the farm; in such case they, the defendants, would extend the time of payment under the said farm mortgage for one year from the 1st day of April, 1882; and allow the plaintiff to remain in possession of the said premises as if no default had been made;" and that in pursuance of such agreement the chattel mortgage was duly given on the 15th of April, 1882.

The alleged breach was, that the society sold the land and the chattels thereon.

The jury found that the defendants did "agree not to enforce payment of the land mortgage for the term of one year from the time the chattel mortgage was given."

They also found a breach ; and assessed the damages.

After the finding of the jury, the learned Judge allowed an amendment striking out the italicised words.

In Easter Sittings, *Crerar* obtained an order *nisi* to set aside the judgment entered for the plaintiff, and to enter a judgment for the defendants.

In Michaelmas Sittings, November 22, 1887, *Muir* and *Wallace Nesbitt* supported the motion, and referred to *Hamilton Provident Loan Society v. Campbell*, 5 O. R. 371, 12 A. R. 250 ; *Cole* on Eject. (1857), p. 68 ; *Wilkinson v. Kirby*, 15 C. B. 430 ; *Foster v. Foster*, 10 U. C. R. 607 ; *McNeely v. McWilliams*, 9 O. R. 728. 13 A. R. 324 ; *Everest and Strode* on Estoppel, 36, 249, 254 ; *Howlett v. Tarte*, 10 C. B. N. S. 813 ; *Davis v. Hedges*, L. R. 6 Q. B. 687 ; *Hindley v. Haslam*, 3 Q. B. D. 481.

J. B. Clarke and *Stone*, contra, referred to *Fitzgerald v. Grand Trunk R. W. Co.*, 5 S. C. R. 204 ; *Bigelow* on Estoppel, 4th ed., 57.

December 23, 1887. ROSE, J.—There are several questions arising upon the pleadings and amendments thereto, and the findings of the jury ; but for the present, I consider the question of estoppel raised by the society.

The estoppel is said to arise in this way :

On the 17th June, 1882, the defendant society brought an action of ejectment against the plaintiff and his wife, in respect to the lands in question herein, claiming default under the mortgage referred to, which was made by the present plaintiff to the present defendants, his wife joining to bar her dower.

The statement of claim was duly filed, and set out the mortgage in the first paragraph.

The second, third, and fourth paragraphs were as follows.

2. " By said instrument, it was provided that on default in payment of said moneys or any part thereof, the plaintiffs should be entitled to take possession of said lands.

3. " The defendants, at the time of the commencement of

this action, were in possession of said lands, and refused to give up the same, although requested to do so.

4. "The defendants have made default in payment of said moneys."

And the plaintiffs claimed possession of said lands and premises.

The defendants made default in pleading a statement of defence, and accordingly, on the 30th September, judgment for possession was recovered.

It is argued that this judgment estops the then defendant and the now plaintiff from setting up in the present action, that in April, 1882, the time for payment under the mortgage had been extended for one year from that date; for, if so, then on the 17th of June, 1882, the mortgage would not have been in arrear, nor would there have been default in payment of the moneys secured by the mortgage as alleged.

The learned Judge overruled this ground of defence relying upon *Howlett v. Tarte*, 10 C. B. N. S. 813.

Without setting out the facts of that case, I find the following statements as to the law in the judgments, at p. 826:

Williams, J.—"If the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel." And then he added: "But the defence set up here is quite consistent with every allegation in the former action."

Willes, J., cited with approval the language of Lord Wensleydale in *Boileau v. Rutlin*, 2 Ex. 665, 681, viz.: "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it."

Mr. Clarke very candidly admitted that to succeed in this action the plaintiff must prove that as to him the mortgage was not in arrear; but contended that he might shew that fact notwithstanding the judgment in ejectment.

I confess I am quite unable to see how the plaintiff can be allowed in this action to contend that at the time judgment was obtained against him in ejectment the time for payment under the mortgage had been extended for a year then current, so that at such date the mortgage as to him was not in arrear.

By allowing judgment to go by default he confessed the making of the mortgage: that it was in arrear; and he had made default in payment; and that the plaintiff society was entitled to possession.

It was not in arrear, he had not made default, and the society was not entitled to possession if the agreement had been made as alleged.

The allegation of such an agreement is inconsistent with these traversable allegations in the statement of claim, to adopt the language of Williams, J., above quoted.

I think the plaintiff cannot be heard to set up such an agreement; and that as his action is founded solely thereon that the action fails.

Had he satisfied me upon this point there would have remained to be considered how far he could set up such an agreement—by parol—as consistent with the terms of the chattel mortgage.

Paragraph 9 of the pleadings shews no cause of action. It set out a sale of the land for less than its value, but does not aver that such sale was wrongful or negligent; and no such case was presented to the jury for their consideration.

The learned Judge gave judgment for \$1,004.94 as damages for a wrongful sale of the lands in breach of the agreement, with interest amounting to about \$39, and \$32 for the value of a reaping machine, in all \$1,071.94, and on the defendants' counter-claim for the unpaid balance of the mortgage debt and interest \$731.11, leaving a balance in the plaintiff's favour of \$344.83.

Mr. Muir said, in view of the counter-claim, which was not in fact recoverable, the plaintiff having no property out of which it can be realized, he would not trouble us to consider the propriety of the allowance of the sum of \$32. We have therefore not considered any question as to it.

The claim of the plaintiff must therefore be reduced by \$1,042.94, which will leave a balance in favor of the society of \$698.11, with interest on \$588.79 since the 25th of May, 1887.

As to the effect of a judgment in ejectment, the following authorities may be referred to.

Hamilton Provident Loan Society v. Campbell, 5 O. R. 371; 12 A. R. 250; *Cole on Ejectment*, (ed. 1857) p. 68; *Wilkinson v. Kirby*, 15 C. B. 430; *Foster v. Foster*, 10 U. C. R. 607, and as to estoppel, *Everest and Strode on Estoppel*, pp. 36, 249, and 254.

The motion will be allowed reducing the plaintiff's claim to \$32, and allowing the defendants' counter-claim at \$730.11, and interest on \$588.78, since the 25th May, 1887, the date of the last calculation by the learned Judge.

As the defendant company has substantially succeeded, it is entitled to the costs of the action, including the costs of this motion.

GALT, C.J., concurred.

MACMAHON, J., took no part in the judgment, not having been sworn in as a member of the Court until after the case had been argued.

[COMMON PLEAS DIVISION.]

TILL V. TILL.

Husband and wife—Wife living apart—Husband in possession of wife's land—Recovery of possession by wife—Claim for use and occupation.

Under the O. J. Act, sec. 25, sub-sec. 2, a Judge sitting elsewhere than in a Divisional Court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court.

On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings," was reserved for the opinion of the Judges of this Court. On the case coming before the Divisional Court it was held that the special case as such could not be entertained; but the application was directed to be turned into a motion for judgment under Rule 323, or on the pleadings and admissions under Rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the land in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for \$2,000, and expended it on improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of writ.

Held, following *Donnelly v. Donnelly*, 9 O. R. 673, the plaintiff was entitled to possession; but could only recover for the use and occupation since the service of the writ.

Held, also, that the defendant could not claim for the moneys expended by him on the land.

THIS was an action tried before Galt, J., and a jury, at Toronto, at the Fall Assizes of 1887.

It was admitted that the pleadings correctly stated the facts, and "a special case on the pleadings" was reserved for the opinion of the Divisional Court.

In Michaelmas Sittings, November 26, 1887, the case came on for argument..

J. B. Hands, for the plaintiff, referred to *McCready v. Higgins*, 24 C. P. 233; *Hopkins v. Hopkins*, 7 O. R. 224; *Dufresne v. Dufresne*, 10 O. R. 773.

N. Murphy, for defendant, referred to R. S. O. ch. 125, secs. 2-5; *McGuire v. McGuire*, 23 C. P. 123.

December 23, 1887. ROSE, J.—This case came on for trial at the October sittings of this Court at Toronto, and the pleadings having been admitted to state the facts, what is called a “special case on the pleadings,” was reserved for the opinion of the Judges of this Court. This was done in forgetfulness of the provisions of sec. 28 of the Judicature Act, sub-sec. 2, which provides that “a Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case for the consideration of a Divisional Court.”

We may, however, direct the application to be turned into a motion for judgment under rule 323, or hear a motion for judgment on the pleadings and admissions under rules 315 and 321. No question may arise as to the power of the Divisional Court to hear such a motion as it was taken before the Court by consent, see rule 471 (4.)

The facts appear from the pleadings as follows :

The plaintiff, wife of the defendant, and the defendant, were married in February, 1865. At the date of the marriage, although it is not so stated with great clearness, the plaintiff owned the lands in question “in fee simple.”

The defendant was then carrying on business in the village of Sutton, and after the marriage, at his wife’s request, sold out the business, and expended the moneys in improving and draining the land, and erecting buildings. The sum thus expended is stated at \$2,000.

The plaintiff and defendant resided on said lands, living together as husband and wife until April, 1886, when they disagreed, and the plaintiff left the premises, and went to reside elsewhere. The defendant and their only child continued and continue to reside thereon.

There are upon the lands certain goods and chattels to which the defendant admits the plaintiff’s right, so that as to them no question arises.

The plaintiff seeks possession of the lands, and a large sum for use and occupation of the lands by the defendant for an alleged period of eighteen years. I cannot understand why eighteen years are named, as if that is correct

the defendant must have been in occupation prior to the marriage, which I did not understand to be so.

The defendant claims title by possession, and a return of the moneys expended.

As to these respective claims, following the decision in *Donnelly v. Donnelly*, 9 O. R. p. 673, and the cases there cited, I think the plaintiff is entitled to possession.

Mr. Murphy argued that the marriage contract bound the plaintiff to live with her husband. Whatever now may be considered to be the effect of that contract in determining the civil relations of husband and wife, it does not assist us here. There is no contract alleged that they should live together on this lot, and as she is not living there, the husband's remaining or asserting the right to remain is not to seek the benefit of his wife's society, but to assert a proprietary right, or a right to the proprietary use of the premises. This, I think, he cannot legally do. She is entitled to "have, hold, and enjoy" the land in question "free" from her husband's "control or disposition without her consent, in as full and ample a manner as if she had continued sole and unmarried"; and this she cannot do, if he remains in possession against her will, and prevents her letting it to others.

I understand that the learned Chief Justice of the Queen's Bench Division some time since, in an action tried before him at Napanee, gave judgment in favour of a wife against her husband for possession of certain lands owned by her and leased by him to certain tenants who paid rents to him, and for an account of the rents and profits. She, as in this case, was not living upon the property.

I do not see any right to any claim by the plaintiff against her husband for an account of the rents and profits received by him during the time they lived together. Apart from any other reason he must, on the case before us, be taken to have received and disposed of them with her consent.

As to those received since she left the place, and prior to the action, I think she may not succeed in her claim, as

I must take it on the pleadings that the writ served in this action was the first demand of possession made upon him; and there is no evidence that he did not receive them with her consent to maintain the child and keep up the property. Since the issue of the writ she is entitled to an account if she demands it.

The claim by the defendant to title by possession is manifestly unfounded. While they both lived upon the place, the possession related to the title of the true owner.

I am also unable to see how his claim for moneys expended upon the place can be allowed. They were not made under any mistake as to title, and must, I think, be held to have been made with the knowledge that the property would reap the benefit whenever possession passed away from him.

There will be judgment for the plaintiff for possession of the land and chattels, and for costs; also a reference to ascertain the amount to be allowed for use and occupation since the issue of the writ. Further directions and costs reserved.

GALT, C. J., concurred.

MACMAHON, J., took no part in the judgment, not having been sworn in as a member of the Court, until after the case had been argued.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

HEINTZMAN ET AL. V. GRAHAM.

New trial—Weight of evidence—Costs.

Replevin for a piano delivered to the defendant as alleged by plaintiffs under an agreement that the piano was received by the defendant on hire for six months at \$5.00 a month, with right of purchase at \$265, \$15 cash, and the balance by instalments, and until purchase money paid the piano to remain the plaintiff's property; that default was made in the payments, and that the plaintiffs were entitled to take possession of the same. The defendant stated that she purchased the piano, no mention being made at the time of the agreement, which was subsequently signed without defendant's authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from the defendant to sign, and also ratification by her. The jury found for the defendant.

The Court, not being satisfied with the finding, directed a new trial with costs to the successful party in the cause.

REPLEVIN.

The action was tried before Rose, J., and a jury, at Toronto, at the Summer Assizes of 1887.

The jury found in favor of the defendant, and judgment was accordingly entered for her. The evidence sufficiently appears from the judgments.

In Michaelmas Sittings *Delamere* obtained an order *nisi* to set aside the judgment entered for the defendant, and for a new trial, on the ground that the verdict was against the weight of evidence.

During the same sittings, December 14, 1887, *Delamere* supported the order, and referred to *Grieve v. Molsons' Bank*, 8 O. R. 162.

Cameron and F. McPhillips, contra.

December 23, 1887. MACMAHON, J.—Without attempting to usurp the functions of the jury who tried this case, by giving an opinion as to which of the parties is entitled to succeed, I think there are many circumstances sur-

rounding the case which escaped the attention of the jury or which they had not adequately considered ; and that therefore there should be a new trial.

It would not be proper to prejudice the future trial of the case by observations regarding the evidence adduced on either side. But the Court in exercising its discretion in setting aside the verdict of a jury on a question of fact, and sending a case down for a second trial, the reasons which impel the Court to the exercise of that discretion should not be withheld.

The agreement between the plaintiffs and the defendant is dated 1st December, 1883, and acknowledges the receipt by the defendant of the piano on hire for twenty-four months, at \$5 per month, with a right to purchase for \$265, payable \$15 in cash, and \$10 on 9th or 11th December, and quarterly payments of \$30 for balance ; and until purchase money paid, the piano to remain the property of the plaintiffs on hire only by the defendant.

This agreement was executed in duplicate the day the piano was delivered at the defendant's house, one copy being retained by the plaintiffs' agent, who executed the agreement on behalf of his principals, the other being left with the daughter of the defendant, who had executed on her mother's (the defendant's) behalf, the latter being unable to read or write.

The defence set up was a purchase of the piano by the defendant from Patterson, the plaintiffs' agent, and the sum of \$15 paid on account prior to its delivery ; and that at the time the purchase was effected and the money paid, there was no mention made of such an agreement as the plaintiffs procured to be executed, under which the property in the piano remained in the plaintiffs until the whole price had been paid.

If the defendant's contention were true, and the piano, which the plaintiffs were to deliver, had been chosen by her, and the \$15 accepted as part payment by the plaintiffs, and she was to have time for the balance of the purchase money, then the property in the piano at once passed

to the defendant as buyer ; and she would, if that were the only payment to be made before she was to have possession of the piano, be entitled to an immediate delivery of the instrument.

But if that were not the case, and if the bargain was concluded at the time the piano was delivered at the house, and while there, and in pursuance of the bargain entered into, the plaintiffs' agent obtained the execution of the agreement as evidencing what he considered to be the real contract between the parties, then it appears to me that this is peculiarly a case where the jury should be asked by properly framed questions submitted to them by the Judge to find specific facts, and in some instances to give their reasons for the findings. The Court will then be in a position to deal intelligently with the case.

Although the defendant is illiterate, so far as being unable to read or write, yet, from her evidence given at the trial, I would assume she was a woman of fair business capacity. But the defendant's daughter, who executed the agreement in the defendant's name, who signed the notes given to the plaintiffs under the agreement, who also signed the renewal notes, and is a young woman apparently of much intelligence and acuteness, stated in evidence that on one occasion when the notes were being signed her mother, in reply to a question put about the signing, said, " the little girl could do the business," meaning the daughter who had transacted the business in connection with this matter on her mother's behalf.

If the daughter was entrusted with transacting the business, it might fairly be assumed that she as agent communicated the existence of the agreement to her mother. But, independently of the actual communication of the existence of the agreement by the daughter to the mother, the notice to the agent (if she were an agent) would be notice to the principal. Then the mother took the agreement together with the receipts to the plaintiffs' office, and a statement was made up shewing the amount the plaintiffs admitted had been paid on account of the piano. The

agreement was again produced by the defendant in her own house, when Rae, the plaintiffs' book-keeper, went there to procure the renewal of an overdue note.

This agreement was in the defendant's house for three and one-half years, and was kept along with the receipts for payments, and the return notes given on account of the piano. Were not these acts cogent evidence that the defendant by her conduct and actions had ratified all that had been done by the daughter who had been attending to this business?

This is a question upon which the opinion of the jury might well be asked, and to which it may be important in one view of the case to have an answer.

I think there should be a new trial, with costs to the successful party in the cause.

STREET, J.—The jury having found in favour of the defendant upon conflicting evidence, we are asked to grant a new trial upon the ground that their verdict was against the weight of evidence.

The learned Judge who presided at the trial is of opinion, and I fully concur with him, that the weight of the evidence was strongly in favour of the story told by the plaintiffs; but this alone would not justify us in setting the verdict aside because we have arrived at a conclusion differing from that arrived at by the jury. The test in such cases proposed by the late learned Chief Justice of the Common Pleas Division in *Grieve v. Molson's Bank*, 8 O.R., 162, at p. 169, is whether, in the opinion of the Court, the verdict does substantial justice; and, adopting this as being the test here, I cannot say that I think it does. The defendant is apparently a person of very limited means. The result of this verdict, if it be allowed to stand, will be either that the plaintiffs will lose the remainder of the purchase money due them altogether, as well as the piano upon which it is due, or that they will be put to another action to recover the amount due them.

There can be no doubt, even upon the defendant's own

shewing, that, whether her contract with the plaintiffs was one of hiring or of purchase, she has broken it, and is seeking to keep the piano without paying what she agreed to pay; and that this action would have been unnecessary, and her possession of the piano would never have been interfered with, had she kept up her payments. If her story is true, she would be entitled to the possession of the piano without regard to whether she paid for it or not. I have much doubt as to whether she ever understood her purchase in this way; I have still more as to whether the plaintiffs ever intended to part with the piano upon such an understanding. I agree, therefore, that there should be a new trial, with costs to the successful party in the cause.

ROSE, J.—I agree that there must be a new trial.

The amount involved is small, but if the defendant is improperly endeavoring to get rid of a contract entered into in good faith by the plaintiffs, and on which they have been relying and acting for four years, she should not be assisted in her endeavour.

The evidence at the trial impressed my mind in quite a different manner to what it seems to have impressed the mind of the jury. I was and am not satisfied with it; and I am of the opinion that it should be submitted again to a jury, and, I think, with questions which will require them to explain their findings of fact as to the authority express or implied of the daughter to sign the contract, and of the ratification by the mother.

The fact that the plaintiffs left with the defendant a duplicate of the contract, and that it was acted upon for four years without objection established, to my mind, their *bona fides*, and the corroborative evidence was very strong.

The costs must be to the successful party in the cause.

Judgment accordingly (a).

(a) This case was subsequently tried, when the jury found for the plaintiffs.

[COMMON PLEAS DIVISION.]

REGINA V. EDGAR.

Canada Temperance Act, 1878—Conviction for second offence—Enquiry as to previous conviction—Necessity for first finding as to subsequent offence—Sec. 115—Peremptory effect of—Certificate of previous conviction—Mode of drawing conviction.

Sec. 115 of the Canada Temperance Act, 1878, which provides for the case of a previous conviction requires that the magistrate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted," &c.

Held, that the language of the section is peremptory; and therefore to give a magistrate jurisdiction thereunder to enquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a second offence, this was not done; and the conviction was therefore quashed.

Quære, whether a certificate of a previous conviction is sufficient *prima facie* evidence of identity of the accused with the person of the same name so previously convicted.

Informations and convictions should be drawn with care so as to specify that the offence is against the second part of the statute.

THIS was a motion to quash a conviction for selling intoxicating liquor "contrary to the Canada Temperance Act, 1878."

September 23, 1887. *Aylesworth* supported the motion.
Delamere, contra.

December 30, 1887. ROSE, J.—The conviction on its face states that the defendant had been previously convicted of a similar offence.

Mr. Aylesworth's objections were: 1. That there was no evidence shewing that the offence was a second offence.

2. That the enquiry as to the number of the offence was made prior to conviction, contrary to the provisions of sec. 115, R. S. C. ch. 106, and sub-sec. *a*.

The information after charging the offence for which the defendant was put upon his trial, also stated a previous conviction, and that this was "his second offence against the Canada Temperance Act, 1878."

After hearing evidence as to the offence in question, the magistrate called upon the accused to plead to the charge of prior conviction, and he refused to answer, whereupon a certificate signed by the same magistrate as to a prior conviction was put in, and, having been objected to as not being evidence under the provisions of the Act, was held sufficient.

The notes of evidence as to this, are as follows :

“Certificate marked “A” considered sufficient evidence for former conviction. I adjudge defendant, Thomas E. Edgar, guilty of complaint laid, and adjudge it to be the second offence, and order him, the said Thomas E. Edgar, to pay a fine of \$100, costs \$18.65, in all \$118.65, forthwith ; if not, distress ; no distress, fifty-five days in gaol.”

Sec. 115 above referred to is as follows : The proceedings upon any information for committing an offence against any of the provisions of this Act in case of a previous conviction or convictions being charged, *shall be* as follows :

(a) “The justices or magistrate or other officer *shall, in the first instance*, inquire concerning such subsequent offence *only*, and if the accused is found guilty thereof, he shall *then, and not before*, be asked whether he was so previously convicted, as alleged in the information * * ; but if he * * stands convicted of malice, or does not answer directly to such question, the justices or Police Magistrate or other officer shall *then* inquire concerning such previous conviction or convictions.”

The language of the statute is peremptory, and the order of proceeding laid down.

To give the magistrate jurisdiction to enquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence.

This he did not do. Unless I am prepared to say that the section is only directory, and may or may not be obeyed, I must hold this conviction bad.

The reason for the requirement may not appear when the two convictions were before the same magistrate ; but the framers of the Act have not distinguished between cases

tried before the same and those tried before different magistrates, and I may not. In those tried before different magistrates the provision is a wholesome one, and tends to keep the mind of the magistrate free from bias against the accused, which might prejudice his trial if an enquiry into prior offences might be made prior to or during an enquiry into an alleged subsequent offence.

I am not called upon to decide as to evidence of identity being requisite on the facts of this case. The production of a certificate of conviction against a man of the same name may be held sufficient to shift the onus; and, in the absence of further evidence, to warrant a finding of identity. See *Hubbard v. Lees*, L. R. 1 Ex. 255; *Hamber v. Roberts*, 7 C. B. 861; *Simpson v. Dismore*, 9 M. & W. 47.

And, notwithstanding the observations of the late Mr. Justice O'Connor in *Regina v. Kennedy*, 10 O. R. 397, 401, I wish to keep myself free to consider whether under sub-sec. (b) of sec. 115, a certificate would not be sufficient evidence of a previous conviction. I do not say it is, and I am not at present convinced that it is not.

I would suggest that informations and convictions should be drawn with more care so as to specify that the offences are against the provisions of the *second part* of the Act.

The merits appear to be against the accused.

The conviction will be quashed, without costs, with the usual certificate of protection.

Conviction quashed.

[CHANCERY DIVISION.]

STRANGE V. RADFORD.

Mortgage—Lands out of jurisdiction—Sale.

Although in an action on a mortgage of lands situate out of the Province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating *in personam* as an extinguishment of a personal right, yet the Court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale.

THIS was an action brought by George Strange against Isaac Henry Radford, in the usual form, upon a mortgage, for sale, for delivery of possession, and for relief under the covenant contained in the mortgage.

The land was in the Province of Manitoba, but the defendant resided in the Province of Ontario.

No defence having been filed by the defendant, the plaintiff applied to the Registrar for the usual *præcipe* judgment for sale, who declined to issue it without the matter being spoken to in Court on the question of the jurisdiction of the Court to order a sale when the mortgaged property is out of the jurisdiction.

Mr. Langton, who appeared for the plaintiff, subsequently applied to the Court for a direction that the judgment should be issued, and argued the point on December 13th, 1887, before Boyd, C.

Langton.—It is clear, upon the authorities, that a judgment of foreclosure, under the circumstances of the present case, may be granted: *Paget v. Ede*, L.R. 18 Eq. 118; *Bryson v. Huntington*, 25 Gr. 265. There is no difference in principle between foreclosure and sale. Wherever the Court can decree foreclosure, it has power to direct a sale: *Holmested's Rules and Orders*, 230. It acts in both cases *in personam*, and the only object in going to the Court is

to have the defendant's right of redemption taken away after an opportunity is given him to redeem. It is a mistake to say that the action, when for sale and not foreclose, is one *in rem*. The property is not, in either case, in Court to be dealt with by the Court. The Court acts *in personam*, and deprives the mortgagor of his personal right to redeem. In default of redemption, where a sale is asked, the plaintiff, who has the legal estate, is in effect declared entitled to sell freed from the equity of redemption. The Court can deal with the defendant's interest, and foreclose it, or direct him to convey it, no matter where the property is situate. The principle on which the Court acts is illustrated, among other cases, in *Penn v. Lord Baltimore*, 1 Ves. Sr. 443, and *Norris v. Chambres*, 29 Beav. 246, and 3 D. F. & J. 583. In the last case it was distinctly held that a lien against property in a foreign country might be enforced by sale if it was founded upon any contract or privity between the parties, and did not arise merely by operation of law, providing the parties were subject to the jurisdiction of the Court. It is true, that in order to give possession to a purchaser the plaintiff might have to bring ejectment in the country where the property is situate, but that does not affect the question whether the Court can direct a sale, and order the defendant, if necessary, to convey and deliver up possession. In *Re Robertson, Robertson v. Robertson*, 22 Gr. 449, a vesting order was granted, transferring the title of lands in the Province of Manitoba.

December 14, 1887. BOYD, C.—No authority is produced for making such a judgment as is now asked, *i. e.* to direct the sale of land in Manitoba to satisfy the claim of a mortgagee who is plaintiff. The mortgagor can be foreclosed, because such a decree acts upon the person, and not upon the land directly: *Paget v. Ede*, L. R. 18 Eq. 118. But any extension of this doctrine, such as putting the machinery of the Court in motion to effect a sale of land in another Province, would be a mischievous novelty: *Story on Conflict of Laws*, 8th ed., secs. 544, 545. The reasons

are very well indicated by Westlake.—I cite the passage: “The claim to affect foreign lands through the person of the party must be strictly limited to those cases in which the relief decreed can be entirely obtained through the party’s personal obedience: if it went beyond that, the assumption would be not only presumptuous, but ineffectual:” *Private International Law*, p. 58, sec. 65. In a sale of mortgage lands it is necessary to deliver possession to the purchaser, and this cannot be enforced by this Court against an occupant in Manitoba. Again, the Master here would have no power to deal with the many matters which are the usual and ordinary incidents of a sale.

I do not know judicially that a sale of lands under mortgage is recognized in Manitoba; but suppose it is, if a sale were ordered, questions manifold would arise as to title, compensation, deterioration, liability to loss in case of fire pending the contract, and the like, depending on the law of *situs*, in which the Master could not act. If the defendant refused to execute the conveyance on sale, title would not pass to the purchaser by a vesting order. If the purchaser was kept out of possession, this Court would be helpless to give relief in any case. It is easy to say that the plaintiff will run all these risks, but it is not the course of the Court to pronounce inoperative judgments, particularly so when other unobjectionable alternatives are open.

The plaintiff may have a foreclosure, or he may, for a sale, go to the Courts in Manitoba. As I have said, the foreclosure operates only as an extinction of the mortgagor’s personal right of redemption: *Re Hawthorn*, 23 Ch. D., at 748; see *Ex. p. Pollard*, 1 Mont. & Ch. 250. But to carry out a sale, it is essential that the Court should have territorial jurisdiction over the land. The Court cannot attempt to supervise the sale of land in Manitoba, and can only give such relief in mortgage cases (where foreign property is concerned) as may be obtained by declarations, and relief against a defendant, who is personally within the jurisdiction.

[THE CONTROVERTED ELECTIONS ACT OF ONTARIO.]

*RE DWIGHT AND MACKLAM.

Contempt of Court—Telegrams—Subpœna—Privilege—45 Vic. ch. 93, sec. 18 (D.)—Telegraph Company, officers of.

Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness, and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election.

The witness stated that he had burnt the telegrams in question with others after being subpœnaed, and while the trial was actually going on, upon instructions received by telegraph from the general manager of the telegraph company in whose service he was; that these telegrams, with others, should have been destroyed before, in accordance with a standing rule of the company, but that he had neglected to do so at the proper time.

Upon the return of an order *nisi* to commit the general manager and the operator for contempt of Court, it was objected that no original subpœna had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in Court; and it was contended that the making away with the messages was not a contempt unless the witness was duly subpœnaed to produce them.

Held, that the question was not whether there had been a proper service of a subpœna; but whether there had been an interference with evidence, which but for such interference would have been before the Court. The documents were in existence at the beginning of the trial; during the trial they were destroyed by the deliberate action of the general manager, whereby the Court was hindered in the prosecution of an investigation of a public nature; and the manager and operator were guilty of a contempt of Court.

Held, also, that no privilege attaches to telegrams in the possession of a telegraph company. 45 Vic. ch. 93, sec. 18, (D.), should not be read as giving an absolute privilege.

Held, lastly, that the operator was the proper person to subpœna to produce the telegrams, as he had the control of them and the ability to produce them.

UPON the trial of a petition under the Controverted Elections Act of Ontario for the Electoral District of the East Riding of Northumberland, before BOYD, C., and OSLER, J. A., two of the Judges for the time being for the trial of election petitions, pursuant to the Act, at Brighton, on Wednesday, the 12th of October, 1887, the second day of the trial, George Macklam was called as a witness for the petitioner.

*This decision, although arising out of an election case, is considered of sufficient general interest to render its publication advisable here, instead of among the election cases.

He said that he was a telegraph operator at Colborne; that he knew Dr. Willoughby, the respondent, and had been subpoenaed to produce any telegrams sent in his (Willoughby's) name to one Franklin, a voter, during the election which was held in December, 1886; he did not produce the telegrams, because they had been destroyed by fire; all messages up to the month of March preceding had been so destroyed; they were destroyed on the preceding day, that is the first day of the trial.

The witness also said that on being subpoenaed he had communicated the order in the subpoena, requiring him to produce these telegrams, to the General Manager, and had received a telegram, which he produced, dated 11th October, 1887, reading, "Destroy the telegrams at once, in accordance with the rules laid down. H. P. Dwight." The witness also produced and read a printed rule of the company, as follows:

"Rule 83.—All messages must be filed away in the order in which they are entered in form 22 and plainly labelled by days and months. Each month's messages must be retained for a period of six months after transmission, and then destroyed by fire. No message will be taken from the files without its place being filled by the blank form (form 71) properly filled up."

When asked why he had not destroyed the telegrams before, in obedience to this rule, he said it was neglect of duty on his part.

He further said that he remembered sending a telegram to Franklin in December, 1886; could not say who gave it to him, or in whose handwriting it was; the respondent's name was signed to it, but it was not in his writing; the message said something about "Come down to-morrow," or something of that kind; there might have been something said about it "being all right."

The presiding Judges then directed their registrar (who was a solicitor) to issue and serve upon Harvey P. Dwight and George Macklam an order *nisi* calling upon them to shew cause why they should not be attached, or otherwise punished for their contempt.

The order issued was as follows :

"To Harvey P. Dwight and George Macklam :—Upon reading the evidence of the said George Macklam given on oath before us, a copy of which is directed to be served herewith, and upon reading the papers produced by him, we do order that you the said Harvey P. Dwight and you the said George Macklam do appear before us on Friday, the 28th day of October instant, at one o'clock in the afternoon, at the town hall in the said village of Brighton (to which time and place the Court for the trial of the said petition stands adjourned), and that you the said Harvey P. Dwight do then and there shew cause why a writ or writs of attachment should not issue against you, or why you should not be otherwise punished for your contempt in ordering, directing, and procuring the said George Macklam to destroy the originals of certain telegrams mentioned in his evidence, which said originals were required for the purposes of the said trial, and were in his custody pending the same.

And we do further order that you the said George Macklam do also shew cause, at the time and place last aforesaid, why a writ or writs of attachment should not issue against you, or why you should not be otherwise punished for your contempt in destroying the said originals of the said telegrams.

Dated this 13th day of October, 1887."

On Friday the 28th of October, on which day the order *nisi* was returnable at Brighton, the Court met there, and formally adjourned till the next day, at Osgoode Hall, Toronto, when—

Hector Cameron, Q.C., appeared for Dwight and Macklam, and read their affidavits.

Harvey P. Dwight said that he was not wilfully or intentionally guilty of any contempt of Court, but that he acted in the manner required by the instructions and orders of the board of directors of the Great North-Western Telegraph Company, of which he was the General Man-

ager; if he had been guilty of any contempt or disobedience he expressed his regret, and trusted that he would be excused. He spoke of the rule of the company, already set out, and said that he had, in addition, been instructed by the board, "in order to preserve, in the interest of the public generally, and as the duty of the company, secrecy and inviolability of all messages," not to produce such messages, and that the company had been advised that the Courts would not compel them to produce such messages without the consent of the sender. He further said that he acted hurriedly, and without legal advice, and without reflecting that he was instructing Macklam to disobey the order of the Court, but intending only to require the general order of the company to be carried out; further, that he did not know for what case the telegrams were required, or that this case was going on, and that he was not influenced by any political or other consideration than his desire to do his duty to the company.

Macklam, in his affidavit, said that he was served with two papers, which appeared to be copies of subpoenas, but was shewn no original; he acted as he did with no wish or intention to disobey the order of the Court, but under the orders of the General Manager of the company, and in accordance with its standing rule; and he expressed his regret if he had erred.

Cameron then argued the case. Macklam's affidavit shews that no original subpoena was exhibited to him when he was served with what purported to be copies; and no original was produced at Brighton, or is now produced. His making away with the messages was not a contempt unless he was duly subpoenaed to produce: *Taylor* on Evidence, secs. 1239 *et seq.* The affidavits shew that there was no deliberate contempt of Court; that the officers of the company were merely following out what they conceived to be their duty to the company. [BOYD, C.—Macklam should be treated with leniency. He was acting on the instructions of his superior officer.] The

consideration of a larger question than the proper service of a subpoena is involved. I contend that the telegraph company are not bound to produce telegrams except upon the consent of the senders. In the interest of the public telegrams ought to be privileged, and the Court will not order them to be produced: *The Coventry Case*, 1 O'M. & H. 104; *The Bridgewater Case*, *ib.* 114; *The Dublin Case*, *ib.* 271; *The Taunton Case*, 2 O'M. & H. 72; *The Stroud Case*, *ib.* 107; *The Bolton Case*, *ib.* 139; *The Harwich Case*, 3 O'M. & H. 62. The Montreal Telegraph Company's Act of incorporation, 45 Vic. ch. 93, secs. 18, 19, (D.), provides for the absolute secrecy of employees of the company. It is noticeable that in sec. 18 there is no exception as to secrecy such as in 44 Vic. ch. 26, sec. 6, (D.) "except when lawfully authorized or directed so to do." The company's private Act is the later enactment; and the absence of these words shews an absolute privilege. Another point is, that the manager, or board of management, should have been subpoenaed to produce these messages, and not a mere operator: *Crowther v. Appelbe*, L. R. 9 C. P. 23.

Judgment was delivered later on the same day (29th October, 1887.)

L OYD, C.—It is desirable just to understand clearly how this matter came before the Court. It is not, it seems to me, a question of subpoena and of proper service in the form of a subpoena at all. It is a case in which it appears that a witness, having been summoned in some sufficient way, or in a way that appeared to the witness to be sufficient, appeared before the Court, and stated that being subpoenaed he appeared there as a witness. He was asked in alleged pursuance of the subpoena to produce certain telegrams. He stated that he had not these telegrams in his possession, but on being further questioned he stated that having been served with the subpoena he communicated with his superior officer, stating that he had been subpoenaed in reference to these particular telegrams, and

upon that telegram being sent to the superior officer he was instructed to destroy the telegrams in question, in accordance with the standing rule of the office that telegrams over six months old should not be longer preserved. That is the way in which the matter came up. The witness appeared before the Court, and it was evident to us, then, that there had been a very plain interference with the proper administration of justice, in that evidence which appeared to us to be relevant and not privileged had been deliberately destroyed by the subordinate officer, pursuant to the instructions of his superior. That is the way in which the matter comes before the Court.

It is not a question of subpoena at all. It is a question of whether there has been an interference with evidence which, but for that interference, would have been before the Court.

It is further to be observed that this is not a privileged case, as between private individuals or corporations. It is a case in which the public are involved. It is of as public a nature as a prosecution for crime can be. The whole community, the particular municipality, and the country at large are interested in the purity of elections, and the very matter which we were in pursuit of in seeking to get these telegrams was, whether or not the respondent, Dr. Willoughby, the sitting member, had been guilty of a breach of the statute law, in that he had procured persons to go and vote by promising to pay them their expenses. That is by the statute made a crime against the election law, and if proved it would vitiate the election, and disqualify the candidate, as has been already held in more than one case. It was, therefore, an investigation of a public nature, just as much so as in the case of any crime against the State, and the Court was hindered in the prosecution of that matter by the destruction of these telegrams, a destruction which was brought about after the trial had commenced.

The Court sat on Tuesday, and on Wednesday, the second day of the trial, it was that this particular witness Macklam, was before the Court, and he stated that on the

previous day, that is, on the first day the Court sat for the investigation of this case, these documents had been destroyed. Therefore they were documents in existence at the beginning of the Court, and during the trial they had been destroyed by the deliberate action of the chief officer in this Province of the telegraph company. This is the way the case came before us, and these facts have not been altered by anything that has appeared since.

It remains then to deal with the legal objections which have been raised by Mr. Cameron in, endeavoring to shield his client, and to have an expression as to the law on these matters. It seems to me that the law is not in any degree of doubt. There should be no doubt about this matter, that telegrams are not privileged. In no sense are they privileged communications. It would be a most unfortunate thing for the community, for suitors, and the public if they were so. The law, I think, is well settled. It has long been settled in this country by a series of decisions, none of which are reported, probably because they have been decisions at *Nisi Prius*. The matter comes before the Court for the first time solemnly now, but the law is by no means doubtful.

Mr. Cameron has called attention to the Act which, he argues, throws a cover of protection over the officers of this particular company, the Montreal Telegraph Company, pointing out that in the Act of 1881, 44 Vic. ch. 26 (D.), which was an Act relating to the telegraph business of the Government, there is a clause as to secrecy *unless when the official is lawfully authorized or directed* to disclose. There is an absence of these words in section 18 of the Act 45 Vic. ch. 93, (D.) the private Act relating to this company, which he says should be so read as to give absolute privilege, absolute secrecy, and that there is no power in the Court to require the divulging of it even for the purposes of justice. That is, perhaps, the strongest argument that he made on the statute law existing in this country.

He argued also, on the general law, citing the English cases, and contending that the weight of authority was in

favor of this privilege. We are both emphatically of opinion that there is no such privilege. First, as to the English cases; there was some conflict of opinion, but the law is well settled, thoroughly well settled now, that no privilege exists in these cases. In a book which collects the law on this subject, "Communication by Telegraph," by *Gray*, a very succinct and admirable treatise, very correct so far as I have investigated, the law is stated thus (p. 206): "In England, previous to the assumption by Government of the control of the telegraph service, this question was invariably answered in the negative," that is that telegrams should not be protected, citing cases; but "since that time, it has been answered in the earlier cases in the affirmative;" citing the *Taunton Case*, 2 O'M. & H. 66, 72; also the *Stroud Case*, 2 O'M. & H. 107, 110; "and in the later ones in the negative." The cases cited are mentioned there.

The last case in England is the *Hurwich Case*, better and more fully reported in 44 L. T. N. S. 187, than in O'Malley and Hardcastle. This is the last deliverance of the English Judges on this point, and it is, of course, binding upon us.

Mr. Justice Lush, on this question arising, said, "that he must consider the *Bolton Case* as overruling the decision in the *Stroud Case*, which was not a considered judgment, but a judgment at the moment. He could not follow Bramwell, B.'s reasoning on either ground. Bramwell, B., seemed to think that there was a strong analogy between compelling an officer of the post-office to produce a telegram, and compelling a clerk in a counting-house to produce his master's ledger. According to his mind there was no analogy whatever between the two cases, because in one the master himself could be subpoenaed, but in the other the Queen could not be subpoenaed. With regard to the other ground, that it would be the means of producing a disclosure of matters which the law held confidential, such as communications between solicitors and clients, and certain communications between husband and wife, that was a question to be determined when the telegram was shewn to the Judge; but it was

not an argument against its production by the post-office authorities. It was an argument against its being put in, if when it was produced the Judge saw it was of a confidential character." That is, a privilege would attach to such if they were communications between solicitor and client and the like, to which the law attaches a privilege, but he indicates very clearly that the telegram *per se* is not privileged because it comes from the custody of the post-office; and the report goes on: "It appeared to him that the Legislature, when they transferred the telegrams to the post-office, intended that the public should be just as well off as they were before, when they could always compel a telegraph company to produce the telegrams, just as they could compel any person to produce a letter."

That is precisely the state of the law in this country. The telegrams have not been transferred to the post-office department, but remain in the hands of a private company. "He, therefore, thought that the decision of Bramwell, B., was really overruled in the latter case, and that the Court was quite authorized to require the production of the telegrams. The statute contemplated that an order should be made, and the telegrams must be produced."

And Manisty, J., said: "If the telegrams were needed for the purpose of proving some step in a prosecution for illegal acts, he could not doubt that they would be, and ought to be produced. Really they were private telegrams, not communications with the Government. The post-office was appointed as a place where they were to be deposited from time to time, but they were very different from State communications. If, again, the production was required for the purpose of revealing how a man had voted, the officer having charge of them might say that he ought not to produce them, because that would be violating the Ballot Act, and disclosing the name of the candidate for whom the person voted; but in this case the officer made no objection."

Intrinsically there was no objection to this particular telegram; it was not as to how voters had voted, but,

so far as we hear, the contents of the telegram were a request to this particular voter to come down and vote, and the telegraph operator thought it might contain the words "It will be all right." So there was nothing which the sender of the message, Dr. Willoughby, might not be compelled to disclose if he himself had been put in the box, if it was a question of disclosing the particular sentence which was in the original telegram.

That was the last English case. The Irish cases are equally decisive on the point. In one of the later cases, in 1881, *In re Thomas J. Smith*, in 7 Law Reports, Ireland, the report says: "Motion on behalf of the assignees of the bankrupt Thomas J. Smith, that the secretary of the general post-office, Dublin, do produce at the hearing all telegrams sent from the bankrupt Thomas J. Smith, on and subsequent to the 8th of May, 1881, to his wife or any other person. *Gerrard*, for the assignees:— In the *Athlone Election Petition Case*, in which I was engaged, an order for production of telegrams was made by Fitzgerald, B., and Barry, J." *Ryland*, for the Postmaster-General, cited the *Taunton Case* and the *Stroud Case*, and said: "In the *Bolton Case* the production was ordered, but there the contents were known. Even if the order be made, it should be so limited as not to cast unnecessary trouble on the department." And "the Court made an order for the production sought, but intimated that the subpoenas in cases of this nature should be so limited by reference to the date, &c., of the documents sought to be produced as to cause as little trouble as possible to the post-office department."

That is the rule here. Of course there was no difficulty of that kind in this case, because the particular messages were referred to and well-known both by the local operator and by the manager, Mr. Dwight. The Court there made an order showing that no privilege attached; and in the latest case in Ireland that I have been able to refer to, a decision in 1883, reported in 17 Irish Law Times Reports, page 30, *Colgan v. Quinn*, the head-note shows

the point: "In an action for malicious prosecution, the Court granted a subpoena *duces tecum* for the production by the post-office officials of telegrams sent by constabulary officers relating to the prosecution; and a similar order directed to the Crown Solicitor as to the information and depositions." Andrews, J., upon the authority of *Smith v. Whelan*, required the production, saying: "Well, you may take the order. On the authority of the cases cited, I think I have jurisdiction to grant it. You must, however, specify the documents accurately, so as not to give unnecessary trouble.

It is to be observed that the Act of 45 Vic. is merely a continuation of the old Act relating to electric telegraph companies, which was passed in 1852, 16 Vic. ch. 10, and the clause in that Act (section 11) relating to penalties for divulging secrets is identically the same as the clause (section 18) in the Act 45 Vic. ch. 93, (D.) on which Mr. Cameron relies. That reads: "Any operator of any telegraph line, or person employed by any telegraph company, divulging the contents of a private despatch, shall be deemed guilty of a misdemeanour, and on conviction shall be liable to a fine not exceeding \$100, or to imprisonment for a period not exceeding three months, or both, in the discretion of the Court before which the conviction shall be had."

Well, this very point upon this statute has been passed upon years ago by a Judge of eminence in Lower Canada, Judge McKay, in *Leslie v. Hervey*, 15 L. C. Jurist 9. The head-note reads: "Held, first; that section 16 of the C. S. C. ch. 67, which declares it a misdemeanour in any operator or employee of a telegraph company to divulge the contents of a private despatch, does not apply to the production of telegrams by the secretary of the company, in obedience to a subpoena *duces tecum*. Second, that telegrams which passed between a principal and his agent are not privileged communications, in a suit in which that principal is a party." He deals with the matter very fully, and speaking of the telegraph company he says (p. 10): "The telegraph company is in the position of a third person, or

secondary agent, employed to convey communications between the principal and his agent. If the knowledge of his employer's business possessed by defendant's witness (Bunten), and the communications which have passed between him and the defendants are not privileged when Mr. Bunten himself is under examination, neither can the same communication be regarded as privileged in the hands of a third person (as the telegraph company here) to whom they have been confided for transmission." A sentence applicable to this case. Dr. Willoughby would not be protected from disclosing this if his memory was the best evidence, but the writing was the best evidence, and passing that through the hands of the telegraph company does not give it a privilege which intrinsically it does not possess.

Dealing with the statute the Judge says: "To contend that the prohibition against divulging the contents of any private telegraph despatch should apply to evidence compelled to be given by order of the Judge in a Court of Justice in regard to facts 'pertinent and relevant to the matters at issue,' is to contend either that telegraphic messages passing between a principal and his agent are to be treated as 'privileged communications,' or that an enactment intended to protect society against wicked or idle disclosures by telegraphic operators, should be so interpreted as to defeat the administration of justice by exempting a witness in a cause from disclosing, though under the orders of a competent Court, facts which it is necessary for that Court to know before finally pronouncing upon the questions at issue in the cause."

He refers then to a case decided in Newfoundland upon a statute similar in terms to this, to be found in 8 Jur. N. S. (Pt. II.) 181. In a sister Province the question there arose on a similar clause of a local Act, 17 Vic. ch. 2, incorporating the New York, Newfoundland, and London Telegraph Company; section 9 of which enacts: "And every operator, agent, or servant of the said company, employed in the transmission or delivery

of intelligence or messages, shall, before he enters on the duties of his office, make oath before a Judge or a Justice of the Peace, that he will not willfully divulge the contents of any message transmitted by the said company, or left with any of its operators, agents, or servants for transmission or delivery, and every person violating the said oath shall be adjudged guilty of misdemeanour, and punished by imprisonment for a period not exceeding one year, and by a fine not exceeding £200." The Lord Chief Justice took time to consider, and afterwards held that that did not apply to the divulging of evidence in the trial of a cause. There was no privilege attaching to a judicial proceeding; he is compelled to divulge if the interests of justice require it.

So that we have concurrence of authorities all pointing plainly and unmistakably to the one conclusion, and Mr. *Gray*, to whom I refer, dealing with the cases in America, where he says the subject has been more fully considered, says that this question has been uniformly answered in the negative. He cites a cloud of authorities, and in the note referring to the argument of Mr. Justice Cooley against such a conclusion, he says that Mr. Cooley was simply arguing as an author in his book on Constitutional Limitations, which is noted in the book I have; it is not a decision as a Judge, but is simply the opinion of a text writer, and is not to be weighed, for one moment, against the deliberate opinion of the Judges to which we referred in the English and Irish cases.

These cases, and those in the Lower Provinces, commend themselves to our judgment as being well decided. This really covers the points argued, except one other point, a subsidiary one, which was suggested, but not pressed, because I think it would be reduced to a *reductio ad absurdum* if pressed. That is upon the case of *Crowther v. Appleby*, L. R. 9 C. P. 23, to the effect that the subpoena had no operation unless directed either to the manager or managing board, wherever located, of this company.

It would be introducing a most prejudicial rule in evi-

dence to say that in subpoenaing a telegraph operator you could not go to the person who had the messages, but must search out the manager or board of managers in a foreign country. *Crowther v. Appleby*, seems to me not to be a decision going that length. In that case the Court refused to issue an attachment against the witness, the servant of the company, who refused to produce the books of the company because the directors who had control were not parties to the record. It was an arbitration, and the directors were not parties to it, and the subordinate party was required to produce these books, and the directors forbade him to do it, and the Court held that under the circumstances they would not enforce the supreme power of the Court by punishing with imprisonment a man who was helpless in the matter, being under the control of the superior officers.

If we were dealing with the subordinate officer, we quite agree that he should not be punished, as he was simply doing what he was told to do by the head officer, and while he acted wrongly and exposed himself to the reprobation of the Court and the unpleasantness of being called upon to shew cause, we think that as the head officer takes the responsibility, the subordinate one should be let off merely with a reprimand, as the Court intimated in *Crowther v. Appleby*. Here we have the managing officer before the Court, the person who effected this act of destruction, and with him we have to deal, and that case is of no moment at all.

But I would not desire it understood that the service of the subordinate officer was not perfectly regular, perfectly proper. There should be no difficulty in the way of procuring as witnesses the persons at the places where messages are despatched. You need not go elsewhere than to the office where the evidence is to be found. The operator had the original message in this case ; he had the custody and possession of it ; it was never transmitted to the head office ; he was the person whose duty it was to destroy it at the end of six months, and it would be a waste of ingenuity to go searching for somebody else when you find the man

who has the message in his hands. I agree with the law laid down in this book (*Gray*), that if a subpoena *duces tecum* is served upon an officer who has the absolute control of the messages and the ability to produce them, he must do so ; and here the very officer so served could and would have produced them, but for the interference of the head office.

That clears away, then, all the points of law which have been urged in dealing with this matter.

We are then brought again to the facts of the case. There has been interference with the course of justice by the action of Mr. Dwight, and there is really no legal excuse to offer. He does, however, state, and we are bound to believe his affidavit, that he acted inadvertently and hastily, and did not know the sort of action that was pending ; that in the hurry of business he sent the message, not reflecting on the consequence, save so far as his company was concerned ; he was desirous of keeping up the credit of his company by protecting these messages from being disclosed, as he thought he might injure the business of his company if protection was not to be secured. That was the desire—the enforcement of the rule of his company that the messages should be destroyed every six months. He thought of that more than the serious consequences involved in the destruction of this evidence referred to. I may pause one moment to say that that rule of the company is really no excuse whatever. Rules which may be necessary in the private conduct of business cannot be allowed to interfere for one moment with the course of justice, or used to destroy evidence, the evidence being in existence, after the officer had already had notification given that these documents were required. If they had already destroyed them in the usual course of business there was an end of the matter, and no difficulty would have arisen. The point of difficulty is, that having knowledge that these were essential documents they deliberately destroyed them. That rule of the company is not in the interests of the public. It is a mere rule of convenience the company has passed to

prevent an accumulation of papers in their offices. In this office the business was not very great, and there was no great accumulation of papers, and there was no need to destroy them, and they lay there ready to produce, and would have been produced, but for the message of Mr. Dwight, and the rule of the company that they should be destroyed cannot for one moment be invoked to protect or excuse that act of Mr. Dwight.

There was a deliberate contempt in destroying evidence that should have been put before the Court, but the Court does not act in a vindictive spirit, and we are disposed to accept the explanation Mr. Dwight has made. He seemed to believe that there was a legal right to protection created; he seemed to think more of the interests of the company than of the public.

We do not imagine there was any political leaning in his act, but that it was the inadvertent act of a zealous officer. It is on that account that we are not disposed to inflict the severer penalty of imprisonment upon Mr. Dwight. It is sufficient to impose a substantial pecuniary penalty, as for a first offence.

We think a fine of \$100 and all the costs which have been incurred by the registrar of the Court, acting as a solicitor of the Court, should be paid by Mr. Dwight, and that the other officer, Mr. Macklam, should be discharged, the blame resting on his superior officer.

OSLER, J. A.—I concur in all that has been said by the Chancellor, and will not weaken the force of it by adding any observations of my own.

Order accordingly.

[COMMON PLEAS DIVISION.]

ANGLO-CANADIAN MUSIC PUBLISHERS ASSOCIATION
(LIMITED) v. WINNIFRITH BROTHERS.

*Copyright—Domicile—Proof of copyright—Right to benefit of Statute—
Knowledge of existence of copyright—Costs.*

The plaintiffs, a company incorporated in England for the purpose of securing Canadian copyright, and of acquiring the protection of the Canadian Copyright Act, 1875, moved to restrain the defendants from offering for sale in Canada a collection of songs imported from New York, which contained songs covered by the plaintiffs' Canadian copyright.

Held, that neither the facts that the domicile of the plaintiffs was in London, England, nor that the defendants were ignorant of the plaintiffs' right were defences to the plaintiffs' action.

The defendants were ordered to pay the costs of the action, although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in Court.

The affidavit of the plaintiffs' manager, setting out their incorporation, and the acquisition of the copyright of the songs in question, and which was in no way controverted, was held, for the purposes of the motion, sufficient evidence of copyright.

THIS was a motion for an injunction to restrain the defendants from importing from the United States, and selling or offering for sale in Canada, certain musical compositions, the copyright of which for Canada was claimed by the plaintiffs.

December 20, 1887, *Bain*, Q. C., for the plaintiffs.

H. Cameron, Q. C., for the defendants.

January 3rd, 1888. *STREET*, J.—The plaintiffs are a company called The Anglo-Canadian Music Publishers Association, (Limited,) incorporated under the English Companies' Acts, with the object of securing Canadian copyright in musical compositions, and to acquire the protection of the Canadian Copyright Act of 1875: their registered office is in London, England; and their Canadian office and place of business is at Toronto.

The affidavit of Mr. Howe, the plaintiffs' manager in Canada, states these facts ; and further states that the plaintiffs are the proprietors for the Dominion 'of Canada of the copyright in the seven songs mentioned in the schedule in his affidavit ; and that the copyright in each case was obtained by him at the dates mentioned in the schedule.

This is the only evidence as to the copyright ; but it is in no way controverted in the evidence of the defendants ; and I think it is clearly sufficient for the purposes of an application of this nature.

The infringement complained of is, that the defendants have imported from the United States, and sold in Canada certain musical books called "The Franklin Square Song Collection," which, amongst a large number of other songs set to music, contain the songs, the copyright in which is claimed by the plaintiffs ; and Mr. Howe states his belief that the defendants will continue to import and sell these songs in "The Franklin Square Song Collection," unless restrained by injunction ; and that it is of vital importance to the plaintiffs' business, and in fact the only condition upon which it can exist, that their copyrights should be protected, and all infringements prohibited : that the defendants have been made aware, by means of a former action in respect of a different musical composition, of the nature of the plaintiffs' business : and that this action was begun promptly after he became aware of the infringement.

The defendants do not dispute in their affidavits the fact that the plaintiffs are entitled to the copyright in these songs, nor the fact that they imported and sold the books in question, nor that they contained these songs ; but they say that they have been for years importing the Franklin Square Song Book before the dates of the plaintiffs, copyrights : that they were not aware of the existence of the copyright ; and that they would have discontinued the importation had they been made aware of it : that the number imported has been small, and their pro-

fits on the sales of it trifling; and that the Franklin Square Song Book is being sold by many other booksellers in Toronto.

Mr. Harold Winnifrith, one of the defendants, was cross-examined upon his affidavit, and denied having acquired or possessed any knowledge of the nature of the plaintiffs' business in the former action referred to. He further stated that upon being served with papers in this action, he had gone to Mr. Howe, and expressed his regret at having infringed the plaintiffs' right; and further, that after becoming aware of the plaintiffs' rights, he determined to sell no more of the publications complained of.

At the hearing of the motion, the counsel for the defendants objected that the proof of the plaintiffs being entitled to copyright in these songs was insufficient: that the plaintiffs were not domiciled in Canada, but in England, where the registered office of the company is situated; and were not, under the 4th section, entitled to the benefit of the Act; and that by the 32nd section it was made necessary that the defendants should be shewn to have imported the publications complained of, with knowledge of the plaintiffs' rights, before they could be made liable in an action.

It was further contended on the part of the defendants, that the acts done by them were done innocently: that the injury to the plaintiffs was trifling: that the importation was stopped upon notice of the plaintiffs' rights; and that, as they were willing to have ceased the importation without an action, they should, at all events, not be charged with costs.

After argument upon the question of the sufficiency of the proof of the copyright, the defendants' counsel agreed to be bound by the opinion I expressed, that the proof was sufficient for the purposes of this motion; and both parties consented that the motion should be treated as a motion for judgment; but the defendants' counsel continued to rely upon his other objections; and judgment was reserved upon them.

I cannot see the force of the objection that the plaintiffs' domicile is not in Canada but in England. If they are not the authors, but the assignees of the authors of the musical compositions in question, then there appears to be no restriction whatever upon their right to obtain copyright, so far as domicile or citizenship is concerned. In other words, a British or Canadian author, or the citizen of any country having a copyright treaty with the United Kingdom, may assign to a foreigner his right to obtain copyright, and the rights of the foreign assignee will be protected. If the plaintiffs are to be treated as the authors of the compositions, then they are domiciled in London, England, where their head office is; and that is certainly a part of the British possessions within the meaning of the Act. In either case the plaintiffs are entitled to the sole and exclusive right of publishing and vending the works in question in Canada.

It does not appear to be necessary under the Act that the defendants should be shewn to have imported for sale the books containing the infringements, *with knowledge of the plaintiffs' rights*, in order to entitle the plaintiffs to succeed, either in a motion of this nature, or in an action to recover penalties, which this is not. The absence of such knowledge on the part of the defendants, ought certainly in most cases of either nature to be an important factor in determining the question of costs, and the amount of the penalty to be imposed in an action for penalties, but would not disentitle the plaintiffs to an injunction. I must, therefore, hold against the defendants upon their second objection.

The defendants appear to have innocently imported, in small quantities only, the songs in question, bound up with a large number of other songs in the Franklin Square Song Book, and this action was brought without steps being taken by the plaintiffs to ascertain whether an undertaking could not be obtained from the defendants to abstain from further infringement.

Upon being made aware of the infringement by the service of the writ, one of the defendants called upon the plaintiffs and expressed his regret for what had been done. He does not appear, indeed, in any way to have offered to undertake not to continue the infringement; but if he had simply appeared in Court upon the motion, admitted the plaintiffs' rights, and consented to an injunction, I should most certainly have refused any costs to the plaintiffs. But he has contested the plaintiffs' rights in Court; and he has thus, to a certain extent, justified the course they have taken.

I think, under all the circumstances, that if the plaintiffs agree to accept five dollars in lieu of all claims to damages, they should have final judgment for an injunction in the terms asked for by their notice of motion, with five dollars for their damages and their costs of the action, including those of the motion; but if they prefer an enquiry as to damages, they are entitled to a final judgment for an injunction with costs and a reference; but in that event without any costs of the reference.

Judgment accordingly.

[CHANCERY DIVISION.]

STORY V. MCKAY.

Bill of exchange drawn in one country and payable in another—Law governing legality of consideration—Domicile.

Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as such, it was under the law of New York, an illegal contract and invalid.

Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated.

THIS was a special case, directed by order of Falconbridge, J., made herein upon the 5th day of December, 1887, and was as follows:

The bill of exchange for fifteen hundred dollars sued on in this action was drawn at the city of New York by the defendant while temporarily residing there, payable at sight to the order of the plaintiffs, on J. B. McKay & Co., Toronto. The defendant was, at the time of the drawing of the said bill of exchange, although temporarily at said city of New York, a domiciled citizen of the Province of Ontario. The plaintiffs, to whose order the bill of exchange was payable, are, and were then, commission merchants doing business in New York, and are and were then domiciled citizens of New York. The bill of exchange was presented for acceptance to J. B. McKay & Co., Toronto, and acceptance was refused. This action is brought against the defendant as drawer.

The question to be determined is, whether the law of the State of New York, or whether the law of the Province of Ontario is to be applied to the facts set out by the defendant in the fourth and fifth paragraphs of his statement of defence in determining whether they are or are not a good defence to said draft.

The further question is also to be determined whether the matters referred to in the third paragraph of the statement of defence and the matters set up in the second and third paragraphs of the statement of reply thereto are to be governed by the law of the State of New York, or by the law of the Province of Ontario.

Nothing herein, however, is to operate as an admission of fact.

The paragraphs of the pleadings referred to in the above special case were the following:

STATEMENT OF DEFENCE

Paragraph 3. The said draft was not accepted, nor duly protested for non-acceptance.

Paragraph 4. During the months of March and April, A.D. 1886, and while the defendant was at the said city of New York, the plaintiffs and the defendant were engaged in certain transactions at the said city of New York, in the nature of pretended purchases and sales of wheat, with the object of speculating in the probable rise and fall in the price of wheat in the New York market, and in the said pretended purchases and sales, it was contemplated and agreed that there should not be any real purchases or sales or transactions, but on the contrary, all the alleged purchases and sales were intended to be, and were merely pretended agreements for purchases and sales made, as the plaintiffs well knew, for the sole purpose of enabling the defendant to speculate in the rise and fall of wheat in the New York market, and without any intention that there should be any delivery or acceptance of said wheat; and the said transactions were all in the nature of gambling or wagering transactions, and illegal and void under the laws of the State of New York.

5. During the time of the said transactions, and while the same were pending and being carried on, the plaintiffs demanded of the defendant the said draft to cover margin or any possible loss that should arise or appear on said pretended transactions in the event of a shrinkage or fall in the market price of wheat in the said market; and the said draft was made and delivered to the plaintiffs in the said city of New York in connection with said pretended and illegal transactions as aforesaid, and while the same were pending, and was drawn and delivered to the plaintiffs under pressure exerted by them on the defendant, and the defendant says that the said draft, being founded on illegal considerations, can not be enforced.

STATEMENT OF REPLY.

2. In reply to the 3rd paragraph of the defendant's statement of defence, the plaintiffs say that the defendant expressly waived prompt presentment of the draft or bill of exchange sued upon, and the delay in the presentment and protest thereof for non-acceptance was not imputable to any default, misconduct or neglect of the plaintiffs, but was in compliance with the special request of the defendant; and the defendant, with knowledge of the delay that there had been, and was, in the presentment and protest of the said bill of exchange, afterwards promised to pay the same, or to make partial payments thereon, and the defendant has so promised, both before and since the commencement of this action.

3. The plaintiffs also say that if the said draft or bill of exchange was not duly protested for non-acceptance, J. B. McKay & Co. had no effects of the defendant in their hands wherewith to pay the same at any

time during the currency of the said bill ; nor had the defendant any reason to believe that they would pay the said draft or bill, nor has the defendant sustained any damages by reason of the said bill of exchange not having been protested for non-acceptance.

The matter came up for argument before Falconbridge, J., on December , 1887.

A. H. F. Lefroy for the plaintiffs. The law which is to govern this contract, as in the case of any other, depends on the intention of the parties: *Robinson v. Bland*, 2 Burr. 1077 ; *Chitty* on Bills of Exchange, 11th ed., p. 122. The defendant being a domiciled Canadian of Ontario, drawing on an Ontario firm, must have intended the law of Ontario to govern : *Jones* on Commercial Contracts, sec. 22, p. 32. More especially as, according to the defendant's own pleading, it would be invalid if governed by the law of New York : *Wharton's* Conflict of Laws, 2nd ed., sec. 507 ; *Parsons* on Contracts, vol. 2, p. 584. It may be correct to say that the drawer contracts to pay where he draws the bill : *Potter v. Brown*, 5 East 123 ; but *Daniel* deprecates this state of the law : on Negotiable Instruments, 3rd ed., p. 857, sec. 901 ; and the New York Court of Appeal, in a recent case, has held that the drawer's contract is to pay where the bill is payable, if the drawee does not pay : *Hibernia National Bank v. Lacombe*, 84 N. Y. 367 ; *Jones* on Commercial Contracts, p. 52-56. At all events that point is not decisive of the question what law is to govern the legality of the consideration. Why should one country care for the policy of another country, provided the consideration is legal under its own law ? No question of comity arises. That the matters set up do not avoid the contract under our law is shown by *Bank of Toronto v. McDougall*, 28 C. P. 345. I refer also to *Everett v. Vendryes*, 19 N. Y. 436 ; *Westlake's* Private International Law, p. 244. And as to the law of the country governing in respect to the matters relating to protest, notice of dishonor, &c.: *Westlake, ib.*, p. 244.

Pearson, for the defendant. I admit the law of this country will govern the matters of protest. But as to the

legality of the consideration, the contract of the defendant was a New York one, and New York law must govern. His contract is to pay in New York if the drawer does not accept or pay, and if the contract is illegal under the law of New York, it cannot be enforced here.

January 9th, 1888. FALCONBRIDGE, J.—It was admitted on the argument that the matters referred to in the third paragraph of the statement of defence, and in the second and third paragraphs of the reply, are to be governed by the law of the Province of Ontario.

As to the fourth and fifth paragraphs of the statement of defence, I am of opinion that the law of the State of New York is applicable. The drawer does not contract to pay the money in Toronto, the place on which the bill is drawn; but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment, he agrees, on due notice, to reimburse the holder at the place where they entered into the contract. See *Story's Conflict of Laws*, sec. 315; *Potter v. Brown*, 5 East. 124; *Hicks v. Brown*, 12 John. N. Y. 142.

I do not think the domicile of the drawer affects the rule as stated.

[CHANCERY DIVISION.]

SEIFFERT V. IRVING ET AL.

*Partnership—Goods supplied to inchoate company—Sale of goods—
Co-operative association—R. S. O. ch. 158.*

The defendants (other than C.) and others signed a certificate of their intention to become incorporated as a co-operative association under R. S. O. ch. 158. They failed, however, to fulfil the requirements of the Act, and never actually became a corporation under it. In the meanwhile the plaintiff supplied the defendants and other intended members of the association with certain goods, and now sued the former for the balance due in respect thereof.

Held, [affirming the decision of BOYD, C.,] that he was entitled to judgment against the defendants as partners; but as to C. who came into the arrangement at a later date than the others, only as to goods supplied after such later date.

THIS was an action brought by Clare A. Seiffert, trading under the name of Seiffert & Co., against Thomas T. Irving, Robert Edward Martell, William Keane, R. W. Coon, and James Stevenson, for damages for breach of an agreement.

The plaintiff alleged in his statement of claim that he was a dealer in cigar leaf tobacco, residing in Detroit, and that the defendants resided in Stratford, in this Province, and were associated together in the manufacturing and sale of cigars under the name of the Stratford Co-operative Cigar Manufacturing Association, Limited: that between February 4th, 1886, and September 18th, 1886, he sold the defendants certain quantities of cigar leaf tobacco at a certain fixed price, and that certain sums were paid on account of the said sales, leaving a balance now due: that about November 7th, 1886, the plaintiff, who was insisting upon a settlement of the said balance, sent his agent to see the defendants and effect a settlement with them: that the defendants Irving, Coon, and Stevenson represented to the said agent that they were (as in fact they were) empowered by all the defendants to make terms with him, and after exhibiting to him a statement of the defendants'

liabilities and assets, they, acting for the said partnership, promised that if the plaintiff would not take proceedings against them, the defendants would place all the cigars in a bonded warehouse, would sell them for cash only, or if on credit only to men of good financial standing, taking their notes at short dates, and would remit to the plaintiff the cash or notes, as the case might be, which they should receive from the sale of the cigars, until the plaintiff's claim was paid in full; that the plaintiff, on the faith of this, stayed the threatened proceedings, but the defendants never placed the cigars in a bonded warehouse, nor did they try to sell them for cash, or on credit, as they had promised; but, on the other hand, divided the said stock of cigars among themselves, and now refused to pay any part of the plaintiff's claim, who therefore claimed the balance due, as a debt due or as damages for breach of the agreement and further relief.

By their statement of defence the defendants denied that they ever carried on business in partnership under the name and style of the Stratford Co-operative Cigar Manufacturing Association (Limited); and that they ever purchased the goods from the plaintiff; and alleged that the plaintiff sold the goods to the Stratford Co-operative Cigar Manufacturing Association (Limited), an association incorporated under R. S. O. ch. 158, and upon their credit, and drew on the association for the price thereof, and now held the bills of exchange and promissory notes of the said association, and set up other defences not necessary to mention here, on which the plaintiff joined issue.

The action was tried on October 18th, 1887, at Stratford, before Boyd, C.

Adair, for the plaintiff.

Harding, for the defendants.

The document of February 2nd, 1886, referred to in the judgment of the learned Chancellor, was entitled "Certifi-

cate of the Stratford Co-operative Association," whereby the signatories certified that they desired to form a company or association pursuant to R. S. O. ch. 158: that the corporate name was to be The Stratford Co-operative Cigar Manufacturing Association (Limited), that the objects of the association were the manufacturing and sale of cigars; that the number of shares was to be unlimited, and to be shares of \$25 each, or such other amount as should from time to time be determined by the rules of the association: that the number of trustees to manage the concerns of the association should be five, and Stratford the place where the operations of the association should be carried on, which certificate, it appeared, had to been duly registered in the registry office of the North Riding of Perth.

The rest of the facts adduced at the trial sufficiently appear from the judgment of Boyd, C., and the argument of counsel before the Divisional Court.

October 18th, 1887. BOYD, C.—Notwithstanding all that Mr. Harding has said, I cannot bring myself to doubt seriously what the result of this action should be. These people endeavoured to form a company under the Co-operative Association Act, and if they had formed that company they would have been protected by the Act, which imposes a limited liability on such corporations. The 20th section of the Act says in so many words: (reading from R. S. O. ch. 158, sec. 20.) They supposed they were proceeding under this Act. Unfortunately they did not take the proper steps to become incorporated, and they therefore remained a company of people, acting each one for himself in what was essentially a trading association. If they failed to be a corporation, they must necessarily be a partnership. They are not a company, they failed to comply with the Act, and the only other alternative is, to hold that they are a partnership, although it is unfortunate they have not protected themselves on the limited liability principle.

The plaintiffs furnished the tobacco in good faith to these people, and there is no dispute about their having received this tobacco, and there is no dispute about the value of it, because the amounts very closely agree. We have \$569, and the books of the defendants show \$566.36 due on the 21st of October, 1886. That is the correct amount. I will take the defendants' figures, \$566.36, for which judgment should be given, it seems to me.

As to Irving, Martel, Kean, and Stevenson; as to the first three gentlemen, it is proved they were associates from the beginning. They signed the paper on the 2nd of February, and although Stevenson did not sign it, yet he admits he was a member of the concern from the beginning, and these four are original members, and they are liable for the whole debt.

An argument was made for Martel, that he was not a member when the first order was given; that same argument may apply as to Irving, Kean, and Stevenson; but I think there is nothing in it. It is said the order was given on the 31st of January, and these persons were associated on the 2nd of February. They sign the articles on the 2nd of February, 1886. I have the original here, and it is sworn before Mr. Harding. The filing was later. The books of the company show that on the 13th of January these people met together to form this concern; and they arranged themselves to go into this business of cigar making, to get the stock and so on, and they had their organization all arranged, except that the papers were not formally drawn up. They had another meeting on the 20th of January, another on the 23rd of February, and in that meeting Mr. Phillips, who is proved to be the manager, informs the associates in his report that "since our last meeting I have purchased from Seiffert, of Detroit, \$487 worth of leaf tobacco," and so on. Then upon that the company move as follows: "it is moved and seconded to receive the report of the manager, and that the same be approved." There is a ratification which amounts to approval from the beginning, and then they

act upon his suggestion, and it is moved and seconded, that an accepted draft be drawn. That was carried. Therefore it is perfectly plain that they adopted what their manager had done. They took this tobacco and turned it into cash just as much as a trading concern can possibly do. Coon, I think, makes a point in his evidence which shows that he should not be liable for any goods supplied before the 20th of April. He was not an original partner, but came in after. He was not in the concern on the 20th April. That would exclude the value of the first order.

The judgment will be for the amount claimed, \$566.36, with interest from the date of the writ; but, in the case of Coon, the part that accrued before the 20th of April should be deducted, and the costs should follow the result.

Judgment stayed until the fifth day of Term.

The defendants now moved, by way of appeal, to the Divisional Court, for an order to set aside the above judgment, and enter judgment for the defendants, dismissing the plaintiff's action, on the ground that the judgment was against the law and the evidence, and the weight of evidence.

The appeal came on for argument on December 5th, 1887, before Proudfoot and Ferguson, JJ.

Lash, Q. C., for the defendants. The defendants are not liable as partners, but each is personally and individually liable for anything that he ordered. In *Thompson*, on Liability of Directors and Officers of Corporations, p. 201, *et seq.*, the law is laid down as I contend for it, at page 207, under "Evidence to charge committeemen." There were some 30 or 35 members of this association. They thought they were members of a corporate body. The plaintiff picked out these five. The goods were delivered to the manager of the proposed company whose business was at Stratford. The manager was appointed by the board of directors—some of these five were among the directors.

The plaintiff thought the body was incorporated all right when he delivered the goods. I rely on the want of evidence to charge any one of these defendants. With respect to Kean, one of the five, there is no evidence. He was not a member of the board. He is not shewn to have taken any part in the matter, or to have had any connection with the plaintiff. Kean is just one of those who subscribed for stock. With the others the plaintiff's agents had conversations, but Boyd, C., did not consider these questions of personal connection, for he held them liable as partners. There never was any intention to create a joint liability. An agreement to organize an association does not create a joint liability. I do not say that no liability can be established. There may be an undisclosed principal for whom the manager acted in ordering the goods, but every shareholder is not a principal. It was proved that Phillips, the manager, reported to the board that he had bought the tobacco, and that they approved, and his Lordship held that this was ratification. There can be no ratification unless the agent assumes to be an agent for the person ratifying. If he was the agent, no ratification is required. The manager assumed to be the agent of the company, not of the defendants. When they approved his report they were assuming to act as a company, not on their own behalf. The defendants are not shewn to have been at this meeting when approval was given. Even if they were all there, it would not make them individually liable. There was no intention to make themselves liable. They signed a certificate under the statute, but they did not proceed with it so as to form themselves into a company.

Moss, Q. C., for the plaintiff. *Boyd, C.*, has found that these defendants are liable on their dealings. This was not a club or benefit society; it was a trading association. They came together to go into trade, and carry it on for a profit to themselves. They signed a paper, which not being effectually followed up into a certificate under the 5th section of the Act, became in reality a partnership

agreement. The trustees are named in the intended certificate. Three of these defendants signed this certificate. If they had followed this up, they might have protected themselves. Twelve persons in all signed this certificate, among them Irving, Martell, and Kean. As to the two others, Stevenson did not sign, but he says he was a member of the association from the beginning. He negotiated and dealt with the plaintiff. Coon came into the business afterwards, but the Chancellor held him only liable from the time he came in. He came in after the second order. They must be taken to have abandoned the idea of getting up the company, and all this time they went on trading. It must be supposed that they had determined to go on as a partnership: *Peel v. Thomas*, 15 C. B. 714; *Tredwen v. Bourne*, 6 M. & W. 461; *Colman v. Bellhouse*, 9 C. P. 31; *Doubleday v. Muskett*, 7 Bing. 110; *Lindley on Law of Partnership*, p. 227. The law is not in such a disgraceful state as to enable these persons to escape their liability.

Lash, in reply. If the plaintiff is endeavoring to fasten the liability on those who took the tobacco, this is not the right form of action—it should be trover or conversion. Those only are liable in this action who held themselves out as purchasers. See the collection of cases in *Roscoe's Nisi Prius*, 15th ed., p. 503,509, under head of “Delivery to an inchoate Company:” *Thames Navigation Co. v. Reid*, 13 A. R. 303.

December 5th, 1887. PROUDFOOT, J.—I have arrived at a definite conclusion in this case, and have no serious doubt. Forty people met for a common purpose to enter into the business of manufacturing cigars, intending to incorporate themselves under the Act. They did not do so effectually; but the business went on, and tobacco was purchased by Phillips from the plaintiff. The purchase was approved by the association. Meetings were attended by all the defendants. The tobacco was manufactured into cigars, and these were divided, the defendants taking some. There

are cases in which people have fallen into a partnership in spite of themselves, and that is what they have done here. The evidence sustains the Chancellor's finding of the facts, which we adopt. It would be a travesty of justice, and an abuse of the Court if the defendants could not be made liable.

FERGUSON, J.—I am entirely of the same opinion. Other people may be liable as well, but certainly these defendants are.

A. H. F. L.

[CHANCERY DIVISION.]

CRYSLER V. THE TOWNSHIP OF SARNIA.

Municipal corporations—Non-repair of drains—Necessity of notice before action—47 Vic. ch. 8. (O.)

Held, affirming the decision of ROSE, J., that the proper construction of R. S. O. ch. 33, s. 30, sub-sec. 3, as also of the re-enactment in 47 Vic. ch. 8 (O.), is that as a pre-requisite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default, and this requirement is not confined to the remedy by mandamus.

Held, therefore, in this action, in which the plaintiff sued a municipality for flooding his lands by not providing a proper outlet for certain drains; and also by not repairing the drains; that inasmuch as there was no evidence of injury, other than arising from the non-repair, and as to this no statutory notice had been given, the plaintiff's action must be dismissed.

THIS was a motion to set aside the judgment of ROSE, J., at the trial of this action in favor of the defendants, and for a reference to the proper officer of this Court to assess the damages sustained by the plaintiff, pursuant to a certain agreement entered into at the trial, which is more particularly referred to in the judgment of FERGUSON, J., *infra*.

The action was one brought by Jacob Crysler against the township of Sarnia, claiming damages for the flooding of his land by allowing too much water to run into certain drains and not providing a proper outlet therefor, and for not keeping the said drains in proper repair.

Besides denying the allegations on which the plaintiff founded his claim, the defendants, in their statement of defence, claimed the benefit of the Acts in force in Ontario relating to municipal institutions, and at the trial, which took place at Sarnia, on October 19th, 1887, raised the contention as to the necessity for written notice by the plaintiff before the action would lie, which is more particularly dealt with in the judgments.

After commenting upon the evidence, the learned Judge concluded his judgment as follows :

“ I cannot at present yield to the doubt which first occurred to me with reference to the construction of the statute, suggested by an observation of Mr. Lash, that the neglect or refusal which would entitle the parties to a mandamus would only be upon reasonable notice in writing, while an action for damage given by the same section to the person might be or would be without notice in writing. I think there is so much force in the observation of Mr. McCarthy, that I must accede to it, that the negligence is only negligence after notice, and that this section fixes and determines what will be evidence of notice to the municipality which would render them liable either to a mandamus or damages, or both after neglect or refusal. There must be neglect or refusal to perform a duty, and that duty, it appears, only arises when their attention is called to the fact that there is ground for the exercise by them of their powers. The defendant corporation agreeing that if the Court takes a different view of the evidence or of the construction of this section to that to which I am now to give effect, a reference may be ordered by the Court, I dispense with the jury and give judgment for the defendant corporation, dismissing the plaintiff's action, with costs. I will stay the entering of judgment until the 5th day of the next Divisional Court.”

The present motion came on for argument on December 5th, 1887, before Boyd, C., Proudfoot, and Ferguson, JJ.;

the notice of motion merely alleging that judgment was contrary to law and evidence, and the weight of evidence, and that upon the evidence the plaintiff was entitled to recover.

Lash, Q. C., for the plaintiff. As to R. S. O. ch. 33, sec. 30 and 47 Vic. ch. 8, (O.), the necessity of notice only applies to the remedy by mandamus and not to an action for pecuniary damages.

Wallace Nesbitt, for the defendants, contended that notice in writing should have been given before action under 47 Vic. ch. 8, (O.), and cited *Fuentes v. Montes*, L. R. 3 C. P. at p. 283; *Maxwell* on the Interpretation of Statutes, 2nd ed., p. 497; *Law v. The Corporation of the Town of Niagara Falls*, 6 O. R. 457; *Bunch v. The Great Western R. W. Co.*, 17 Q. B. D. 215.

Lash, in reply, cited *Thorpe v. Brumfitt*, L. R. 8 Ch. 650; *Wood* on Nuisances, 2nd ed. p. 831.

December 21st, 1887. BOYD, C.—The proper construction of the Ontario Drainage Act, R. S. O. ch. 33, sec. 30, sub-sec. 3, is, that as a pre-requisite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default. This is not confined to the remedy by *mandamus* as was argued before us. It is intended to be for a safeguard to the municipality so as not to expose them to litigation before their attention has been called to that which is specially within the cognizance of the individual complaining. *White v. The Corporation of the Township of Gosfield*, 10 A. R. 555, was an analogous statute, in which case a written notice was given, and both grounds of relief claimed by way of *mandamus* and damages. I do not read that case as deciding that an action for damages lies as at common law for breach of the statutory duty without any prior written notice, but as dealing with the question whether the remedy in the circumstances of that case was by action or arbitration. The

repeal of sub-sec. 3, and the re-enactment in 47 Vic. ch. 8, (O.) makes it, if possible, more plain that a written notice should be given before the Court is resorted to.

I am not entirely satisfied that the case should have been withdrawn from the jury; but after a careful perusal and consideration of all the evidence, I cannot say with any certainty that there was evidence to submit to them. The evidence of the engineer is to the effect that there was no appreciable damage to the plaintiff from the water apart from the injury flowing from the non-repair of the Government drain. The other evidence does not change the complexion of the case. Craig's evidence of the water during freshets getting higher every year (he says for the last six years, but he particularizes only as to 1885, 1886, and 1887) merely indicates that the drains are yearly filling more and more with silt and weeds, and do not carry off the water so well, or rapidly, as if they had been kept in repair. There is no evidence that the extension of the Government drain has brought more water down that drain and to this land, than would naturally come there, nor that the Government drain, if kept in proper order, would not act as beneficially as before the new lines of drain were opened. The evidence fails to shew damage to the plaintiff by water being brought down so as to overcharge the Government drain—rather is it said that want of repair has carried the overflow, which indeed must always happen to a greater or lesser extent during freshets, owing to the flat country around.

The effect of the drainage, generally, has been to cause a subsidence of the land at the plaintiff's property, and below that to lake Huron, and to this the greater depth of the water in recent years may be attributable. But, according to the evidence, there is no appreciable damage on account of the additional water brought down by the later drains in the choked up condition in which they were in in the years now in question. Tuck's evidence shews that the injury from the floods was caused by the ditch being blocked and filled, and out of repair. To the same effect

is Bunning's evidence, but he is not able to say that there is any change in the volume of water coming down for the last four years.

It was admitted during the argument that an injunction was not claimed, and that no question of right was involved as the township had commenced to reconstruct and repair the drainage system before action. It was also admitted that the plaintiff could not recover unless he showed some substantial damage for which he had a right of action.

If the action does not lie for non-repair because of the want of notice, then there is no appreciable damage to be valued on account of any overcharge of water in the Government drain, and so the holding of the Judge at the trial was right, and this appeal fails.

PROUDFOOT J.—36 Vic. ch. 38 sec. 25 (O.) Where a drain lies in two municipalities the duty is laid upon each to repair the part within its own limits, and neglecting to do so after notice in writing it may be compelled to do so by *mandamus*, and liable to damages in an action by any person injured. Where a drain is wholly within a municipality, it is the duty of the municipality to repair (nothing being said of notice or *mandamus*, or right of action.)

36 Vic. ch. 39, sec. 17 (O.), an equivalent provision, and observes the same order.

36 Vic. ch. 48, secs. 459, 460, Municipal Act, makes similar provisions, and observes the same order.

R. S. O. ch. 33, sec. 30 rearranges 36 Vic. ch. 38 sec. 25, splits it up into three sub-sections, and in the first imposes the duty to repair upon each municipality when a drain lies in two municipalities; in the second imposes the duty to repair on a municipality when a drain is wholly within it; and the third provides that upon neglect and after notice &c., a *mandamus* may be had, and gives a right of action to a person injured, thus requiring notice in writing in both cases, while by the original Act it was only required in one.

37 Vic. ch. 20, sec. 6, repealed secs. 1-18 of 36 Vic. ch.

39. R. S. O. ch. 174, secs. 542, 543 repeats the provisions of 36 Vic. ch. 48, secs. 459, 460 and continues them in the same order.

Although it seems strange that under the Drainage Act notice should be required in both cases, and in the Municipal Acts it should only be required in one; yet the language seems too plain to avoid that conclusion, and in this case no notice having been given the defendants cannot be held liable for non-repair.

White v. Gosfield, 10 A. R. 555, was a case under the municipal law, and the point decided seems to have been that where the drain was wholly in one municipality, a person injured by non-repair might bring an action, but was not bound to submit to arbitration. No question arose as to notice, for notice in that case had been given.

There remains another question. Besides allowing the drain to go out of repair, in fact in some places to be no drain, the municipality constructed some branch drains flowing into the main drain flowing through the plaintiff's land. Some of these branch drains appear to have been obstructed perhaps to as great an extent as the main drain, but others of them remain open. The witnesses found great difficulty in determining to what extent the water on the plaintiff's land was caused by these branch drains, and how far the plaintiff was injured by the want of repairs, and how far by the excess of water. That some of the water came from these drains is tolerably plain. Had the evidence rested there I would have thought it a proper question for the jury to decide. There was, however, further evidence that the soil in the swamp on the plaintiff's land, through which the main drain ran, was of such a spongy nature that the cutting of the drain had lowered the soil about a foot; and there was also the further evidence that the water flowing from the side drains would, from the natural inclination of the land, have found its way to the swamp on the plaintiff's land, the only effect of the branch drains being somewhat to accelerate the time of its reaching there. That being the case, I cannot say

that the learned Judge should have submitted the case to the jury, and if I was to hold otherwise, it is not the kind of case in which the damages could be ascertained with some reasonable precision by a reference.

I think, therefore, the judgment should be affirmed.

FERGUSON, J.—It appears that at the close of the plaintiff's evidence counsel for the defendants moved for a nonsuit, and that the learned Judge agreeing with him that the plaintiff had not proved his case, thought it a proper and convenient course to discharge the jury and enter a judgment for the defendants; it being conceded that if this were done and if the full Court should not be of the same opinion, but, on the contrary, of the opinion that the plaintiff had established a liability of the defendants to him for the damages for which the action is brought, or any part thereof, it would be in the power of the Court to direct a reference to the Master to ascertain the amount of such damages, in the same manner as this could be done by the learned Judge at the trial after having discharged the jury, had he been of the opinion that the plaintiff was entitled to succeed. There seems to have been no objection to this course being adopted. The jury were discharged, and a judgment in favor of the defendants delivered dismissing the plaintiff's action, with costs, the entry of the judgment being stayed till the fifth day of the sittings of the Court, and the case is now before us on a motion against the judgment.

At the trial a question arose as to the construction of 47 Vic. ch. 8, which repeals and is substituted for sub-sec. 3 of sec. 30 of ch. 33, R. S. O., which substituted section is as follows:

“3. Any municipality liable to keep in repair any such drainage works, and neglecting or refusing so to do upon reasonable notice in writing being given by any person interested therein, and who is injuriously affected by such neglect or refusal, may be compelled by *mandamus* to be issued from any Court of competent jurisdiction, to make from time to time the necessary repairs to preserve and maintain the same, and shall be liable to pecuniary damage

to any person who or whose property is injuriously affected by reason of such neglect or refusal."

It is not disputed that the defendants are liable to keep the drainage works in question in repair. The plaintiff, however, did not give them any written notice such as required by this section. He did not give any written notice at all, and the defendants contend that for this reason, if there were none other, the plaintiff cannot sustain the action. The plaintiff, on the contrary, contends that the written notice mentioned in this section has reference to and is necessary only in cases of proceedings by *mandamus*, and that his action for pecuniary damages is not defeated by reason of his not having given the defendants such reasonable notice in writing.

It was shown that the defendants had, under the authority of various by-laws passed by them, constructed various drains leading into the drain called the "Government drain," which had been assumed by the defendants, and which passed through the plaintiff's lands, and it was contended that the evidence shewed that by means of these waters were brought more rapidly down to and into the drain called the "Government drain" than they would otherwise have come. That this drain (the Government drain) had greatly filled and was much in want of repair, was not on the argument before us disputed. Nor was it contended that the defendants could without the reasonable notice in writing be compelled to do the necessary repairs to it.

The defendants contend that the overflow and flooding complained of by the plaintiff is attributable to the stopping up or non-repair of the Government drain (and so the learned Judge has found), and that for this reason the complaint of the plaintiff is necessarily confined to the case of non-repair by the defendants of this drain.

The plaintiff contends that, apart from the non-repair, he has made out a case against the defendants, which is this: that the defendants, by the construction of the other drain under the authority of their by-laws, caused larger quantities of water to flow down upon his lands and to come with

greater rapidity than they would otherwise have come, without providing a proper outlet for such additional waters, and that by reason of this, his lands were flooded to a greater extent and the consequent damages to him were much greater than they would have been had there been nothing to complain of but the want of repair of the drain called the Government drain, and he contends that the finding of the learned Judge in respect of this is erroneous.

Had one been left to draw an inference of fact from the undisputed facts, namely, the construction of the drains under the by-laws for the purpose for which they were constructed, and at one time at least their having delivered or emptied their waters into the Government drain above the plaintiff's lands, and the condition of the Government drain where it passes through the plaintiff's lands and below that place, this inference might, I think, have been drawn in favor of the plaintiff's contention. The plaintiff, however, gave evidence upon the subject, and I think the evidence of the engineer as to the condition of the place generally, and as to the condition of the drains constructed under the by-laws, and his opinion in respect to the alleged difference in the degree of flooding taken in conjunction with the testimony of the other witnesses who live and have their farms near the place in question, is so far against this contention of the plaintiff as to prevent one from drawing the inference in his favor, and for these reasons I am of the opinion that the finding of the learned Judge as to this part of the case was right.

There remains, however, the question as to whether or not the plaintiff could sustain his action for pecuniary damages for the non-repair of the Government drain without having given the reasonable notice in writing mentioned in the statute before referred to, and in respect to this I agree in the conclusion arrived at by the other members of the Court that such a notice was necessary to enable the plaintiff to maintain the action for that cause. I think such is the meaning of the words of the section, and I can-

not otherwise read them. There having been no such notice given by the plaintiff, I am of the opinion that the action fails on this ground also.

The judgment, I think, should be affirmed.

A. H. F. L.

[CHANCERY DIVISION.]

JONES V. McGRATH.

Husband and wife—Conveyance directly from one to the other.

A conveyance direct from husband to wife is not necessarily void to all intents and purposes ; in equity it may be void.

Therefore, in this action, in which the plaintiff claimed possession of the lands against J. M., who, in 1884, had conveyed to S. M., his wife, for an expressed consideration of \$100, S. M. having, in 1887, conveyed to the plaintiff, and in which J. M. now contended his deed to S. M. was void, and the Judge at the trial on that ground nonsuited the plaintiff at the opening of the case.

Held, that there must be a new trial, especially as it was stated by counsel that the legal estate was outstanding in a mortgagee, at the time of the conveyance from J. M. to S. M.

THIS was a motion to the Divisional Court to set aside a nonsuit entered by Galt, J., at the trial of this action and for a new trial.

The plaintiff brought this action to recover possession of certain lands, claiming by virtue of a conveyance from one Susan McGrath, dated March 28th, 1887. The defendant was James McGrath, the husband of Susan McGrath, to whom he conveyed or purported to convey the land in question by a deed dated October 18th, 1884.

At the trial, Galt, J., upon the case being opened, decided that the deed from James McGrath to his wife was void, as being made between husband and wife, and for this reason dismissed the plaintiff's action.

The plaintiff now moved against this judgment, and the

motion came on for argument on December 1st, 1887, before Boyd, C., and Proudfoot and Ferguson, JJ.

English, for the plaintiff. Although the mortgage was not put in evidence, as a matter of fact, the legal estate is in a mortgagee. We are dealing with equitable estates. Galt, J., held that nothing passed by the deed from the husband to the wife. The defence sets up that the deed was obtained from the husband by the wife by fraud, but Galt, J., refused to enter into this question. We rely upon *Baddeley v. Baddeley*, 9 Ch. D. 113; and the other authorities collected in *Whitehead v. Whitehead*, 14 O. R. 621; *Sanders v. Malsburg*, 1 O. R. 178; *Heenan v. Heenan*, 3 C. L. T. 163; R. S. O. ch. 125, sec. 2. The reason for the common law rule was, that the wife could not hold separately. Unity of estate has been severed by the Act of 1859; that Act excepts property conveyed by her husband during coverture: *O'Doherty v. The Ontario Bank*, 32 C. P. 285.

MacGregor, for the defendant. There is in evidence only a deed from James to Susan. The mortgage was not put in. The plaintiff cannot recover on the equitable estate. This is a purely common law action of ejectment. I refer to *Glass v. Burt*, 8 O. R. 391; *Thorne v. Williams*, 13 O. R. 577; *Ogden v. McCarthy*, 36 U. C. R. 346; *Redman* on the Law of Husband and Wife, p. 63; *Lush* on the Law of Husband and Wife, p. 183; *Tiffany v. Clarke*, 6 Gr. 474; *Beard v. Beard*, 3 Atk. 72; *Price v. Price*, 14 Beav. 598; S. C., DeG. M. & G. 308; *Milroy v. Lord*, 4 DeG. F. & J. 264; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Moore v. Moore*, L. R. 18 Eq. 474; *Hayes v. Alliance Assurance Co.*, L. R. Ir. 149; *In re Breton's Estate*, 17 Ch. D. 416; *Lewin* on Trusts, 8th ed., pp. 68, 69. The question is, whether the husband is constituted a trustee. Where there is nothing in the conveyance to shew that the husband is to be regarded as a trustee, the Court will not assume it. If it was a voluntary conveyance it could not be enforced against the settlor.

December 21st, 1887. BOYD, C.—The defendant claims that no title passed by his deed to his wife, and for that reason he claims to be still the absolute owner of the land. He says that he has always been in possession of the land, and by counter-claim asks that his deed to his wife may be cancelled. The conveyance thus attacked, is of date October 18th, 1884, between James McGrath and his wife Susan, without the intervention of a trustee. It purports to be made in consideration of \$100, as to which, there is a duly executed receipt, and it is registered on the day of its execution. The Judge dismissed the action, on the opening, on the ground that this conveyance was inoperative. It is unfortunate that the case was stopped at the outset. It is said that there is a mortgage by the husband and wife to the Trust and Loan Company, by which probably the legal estate is conveyed to the mortgagees. This mortgage is alluded to in the defence, and its existence was not disputed, though it is not in evidence. This deed must, on its face, be assumed to be for valuable consideration paid by the wife, and in equity the conveyance may be good, though no third person was brought in to pass the legal estate to the wife. If there was only an equitable estate in the husband, it may be that the conveyance to the wife was sufficient to pass all his remaining interest in the property. . Nearly all the cases were collected by my brother Proudfoot in *Whitehead v. Whitehead*, 14 O. R. 621, and I agree with his view of the law as to deeds such as this. This reading of the law as between husband and wife (leaving creditors out of the question) is in harmony with the view of very able jurists in the United States as well as in England. I refer to *Shepard v. Shepard*, 7 Johns. Ch. 57; *Putnan v. Bicknell*, 18 Wisc. 331, and *Wellingsford v. Allen*, 10 Pet. S. C. 583.

I think that the judgment should be set aside, and the action sent back for trial, when after all evidence is given the rights of the parties may properly be decided. Costs will be reserved, to be disposed of after the merits are heard on further trial.

PROUDFOOT, J.—I do not think this question has ever come up squarely for decision in a Divisional Court. Were I to act upon some cases that have come before individual members of the Court upon voluntary deeds, I would say that the plaintiff is entitled to recover ; and if that be the case in regard to voluntary deeds, much more would it be the case upon a deed for value, which this purports to be. But in order to obtain a satisfactory conclusion, many things require to be ascertained as to which there is no evidence,—the date of the marriage, the fact of consideration, &c. And, besides, the defendant has had no opportunity of giving evidence to establish his defence of fraud. It seems necessary then that there should be a new trial, and the costs be reserved.

FERGUSON, J.—The plaintiff seems to have purchased the lands in question from Susan McGrath for the sum of \$3,000, and received from her a conveyance of the same, dated the 28th March, 1887, and it is not disputed that this purchase money was fully paid.

Susan McGrath was the wife of James McGrath, who had by deed, bearing date the 18th day of October, 1884, conveyed, or professed to convey, the lands to her for the expressed consideration of one hundred dollars.

Both these deeds purport to be under the Act respecting short forms of conveyances, and they appear to have been duly registered, one upon the 18th of October, 1884, and the other upon the 9th of April, 1887. There is nothing to shew that the consideration of \$100 was not paid. Besides the acknowledgment of the payment of it in the body of the deed, there is a receipt for it in the margin in the usual way and form. It should at present be assumed, I think, that this consideration was also paid.

The plaintiff brings his action against James McGrath claiming possession of the lands. At the time of the conveyance to the plaintiff there was a mortgage upon the lands for \$600. This was paid off by the plaintiff, and the balance of his purchase money \$2,400 paid in cash. It was

stated at the bar that at the time of the conveyance from James McGrath to Susan McGrath, his wife, this mortgage was in existence, and the legal estate outstanding in the mortgagee.

At the trial, the learned Judge, upon the case being opened, decided that the deed from James McGrath to his wife Susan McGrath, was void, as being made between husband and wife, and for this reason dismissed the plaintiff's action.

This subject, as to the effect of a conveyance between husband and wife, has been considered in the very late case of *Whitehead v. Whitehead*, 14 O. R. 621. In that case the conveyance was much the same as in the present case. There, however, the consideration was, "natural love and affection," and the sum of \$5 only; and it was held that the evident intention of the owner might be given effect to, as far at least as the beneficial interest in the property was concerned. It was said that the case of *Glass v. Burt*, 8 O. R. 391, was at variance with this decision, but I am not of this opinion. I do not perceive any conflict between *Glass v. Burt* and *Whitehead v. Whitehead*. In *Whitehead v. Whitehead* the learned Judge refers to many authorities, and notices that there existed a conflict of opinion on the subject.

In the present case I think the learned Judge was in error when he ruled or decided that the conveyance from the husband to the wife was necessarily void to all intents and purposes, and as a plaintiff may now sustain an action for the possession of land upon an equitable title, it seems to me that this is all that need be decided at present.

I agree that there should be a new trial.

A. H. F. L.

[CHANCERY DIVISION.]

MORGAN V. MORGAN.

Dower—Damages for detention—Alienation by husband.

Held, that a widow cannot recover damages for detention of dower when her husband did not die seized, even though she made demand for dower.

THIS was an action brought by Jane Morgan against John Morgan, in which she claimed dower in an undivided one-third part of lot 1, in concession 11, township of Hibbert ; and also in lot 2, in the said concession, of which her late husband Henry Morgan had been seized of an estate in fee simple subsequently to his marriage with her, but which he had in his lifetime conveyed to his brother, the defendant, who, as the plaintiff alleged, was still the owner thereof, and refused, although required so to do by her, to assign to her dower therein. She also alleged that the defendant had, since the death of her husband, deprived her of her rights as dowress in the said lands, and she claimed damages for the detention of the same. She therefore claimed a declaration that she was entitled to an estate by dower in the said lands ; that her dower therein might be allotted and assigned to her, or the lands partitioned or sold and the value of her dower paid to her ; and damages for the detention of her endowment in the said lands, from January 29th, 1885, the date of her husband's death.

By his statement of defence, the defendant alleged that pursuant to the provisions of the Dower Procedure Act, he filed with his appearance in this action, an acknowledgment that he was tenant of the freehold of the first mentioned land in question, and consented that the plaintiff might have judgment for her dower, and that she might take the proceedings authorized by the Dower Procedure Act, to have the same assigned to her ; and he therein repeated the same acknowledgment and consent, and sub-

mitted that the plaintiff should not, in any circumstances, be entitled to any costs in connection with her claim to dower out of the said lot No. 1, and that no statement of claim in that behalf was necessary; that he had not refused, and did not refuse to assign to the plaintiff her dower in the said lot, and had not deprived her of her rights as dowress therein; but that he disputed her right to dower in the other lands, because, after becoming seized of the lands, Henry Morgan executed two mortgages thereon in which the plaintiff joined to bar her dower, and before his death, Henry Morgan conveyed the equity of redemption, subject to the said two mortgages to the defendant; and though the plaintiff did not join in this conveyance to the defendant, still the defendant submitted that, as the estate in the lands in which the plaintiff did not bar her dower, was an equitable estate only, and as Henry Morgan did not die beneficially entitled to that estate, the plaintiff was not entitled as against him, the defendant to dower in said lot 2.

The action came on for trial on September 21st, 1887, before Mr. Justice Armour, at Stratford. No one appeared for the defendant at the commencement of the trial, and evidence was given for the plaintiff, who produced and proved a notice dated July 5th, 1887, signed by her, by her solicitor, and addressed to the defendant as follows:

“Take notice that I hereby demand from you the assignment of dower in lot 1, concession 11, of Hibbert, offered by your solicitor, and unless you forthwith tender me such that I may know the metes and bounds thereof, and be enabled to enter into possession thereof at once, I must proceed at law and seek to recover the costs of doing so from you.”

The plaintiff proved service of this notice on the defendant on July 7th, 1887.

This action was commenced on July 9th, 1887. The proceedings as to lot 2, were abandoned by the plaintiff before trial.

After hearing the evidence, Armour, J., entered judg-

ment as follows: "I find that the plaintiff is entitled to dower in one undivided third of lot 1, concession 11, of Hibbert, and that she is entitled to judgment to recover the same, and I direct that such judgment be entered for the plaintiff against the defendant. I also direct that judgment be entered for the plaintiff against the defendant to recover \$82.50 damages for the detention thereof from May 25th, 1886, till November 27th, 1887, with full costs of suit, and I direct that such judgment shall be so entered on and after the 5th day of next Micheltmas Sittings."

After this judgment had been entered and the case closed, counsel for the defendant appeared and asked to have the case opened up, and obtained permission to file papers and documents on the defendant's behalf, viz., correspondence which had passed between the solicitors, and the deed to the defendant from Henry Morgan. His Lordship remarked that owing to the state of the law governing dower at the present time, he would like to have the matter disposed of by the full Court, and he made the following endorsement on the pleadings: "This case was taken in the absence of defendant's counsel, and upon his arriving at the county town, he applied for leave to re-open the case, but I thought it better, as he had nothing but documentary evidence to give, that he should be at liberty to file it, and upon it and the evidence already given, he could move the Court against the judgment, and I so ordered: all the documentary evidence on either side, to be subject to objection as to admissibility."

The correspondence between the solicitors showed demands for dower made on behalf of the plaintiff, as early as May 6th, 1885, and a letter from the defendant's solicitors, dated June 1st, 1885, repudiating the plaintiff's claim for dower in lot 2, but offering to submit to the defendant for his consideration any statement by the plaintiff of what she was willing to accept to release any rights of dower in lot 1. It also showed notices claiming dower sent to the defendant's solicitors in a letter of January

24th, 1887, and a letter from the defendant's solicitors January 26th, 1887, returning the same with admission of service, and saying "we now advise you as we did some time ago that Mr. John Morgan admits that Jane Morgan, the widow of Henry Morgan, deceased, is entitled to dower in one undivided one-third interest in lot 1," &c.

The defendant now moved the Divisional Court for an order sitting aside the verdict and judgment for damages and costs, and directing judgment to be entered in favour of the defendant for costs, or for an order limiting the judgment of the plaintiff to the right to dower without damages and without costs, and ordering the plaintiff to pay the defendant's costs, or for a new trial, supporting the application by affidavits of the defendant and his solicitors as to what took place at the trial, and between the solicitors prior to this action, and alleging that at all times after having taken advice on the subject in May, 1885, the defendant acknowledged the plaintiff's right to dower in lot 1, and was at all times after said date willing and ready that the same should be assigned to her, and proving also the acknowledgment filed with the appearance, as alleged in the statement of defence, and that Henry Morgan was not seized of lot 1 at the time of his death.

The motion came on for argument on December 2nd, 1887, before Boyd, C., and Ferguson, J.

Lash, Q. C., for the defendant. There should be no damages and no costs. The defendant never disputed the dower as to lot 1. The defendant gave consent to judgment in his appearance and again in his defence. The plaintiff submitted to the defence as to lot 2, and the action went down to trial upon lot 1. Plaintiff claims damages for detention of dower. Here the husband did not die seized, but he owned the land during marriage, and the dower attached. The Dower Procedure Act, R. S. O, ch. 55, says that all proceedings for dower shall be taken under the Dower Act: see secs. 7, 10, 20. The effect of sec. 20, is considered in

Linfoot v. Duncombe, 21 C. P. 484; *Ryan v. Fish*, 4 O. R. 335. That a plaintiff cannot get damages for arrears without demand is established; *Cameron on Dower*, pp. 5, 499; *Losee v. Armstrong*, 11 Gr. 517; *Phillips v. Zimmerman*, 18 Gr. 224; *Scratch v. Jackson*, 26 U. C. R. 189. There was a demand served July 7th. Action begun July 9th. A prior offer is alluded to in the demand. There was no refusal. How could the dower in an undivided third be set out by metes and bounds, as required by the plaintiff? The plaintiff should pay all costs after the appearance. If she does not get damages she ought not to have gone down to trial. She is not entitled to damages because of the want of a proper demand.

Idington, Q. C., for the plaintiff. I refer to *Watson v. Watson*, 10 C. B. 3; *Park on Dower*, 301, 303. The only decision in our own Courts on the point I raise, is *Ryan v. Fish*, 4 O. R. 355. I refer also to *Bright* on the law of Husband and Wife, p. 424; *Delver v. Hunter*, Bunbury, (Exch. R.) 57. In *Stewart* on the law of Husband and Wife, p. 297, all the cases are collected. See also *Grieve v. Woodruff*, 1 A. R. 617; *Keith v. Trapier*, 1 Bayley, (S. Car.) 64; *Tyler* on the Law of Infancy, 2nd ed., p. 633; *Harvey v. Pearsall*, 31 C. P. 339; *Giles v. Morrow*, 1 O. R. 527; *Crabb* on Real Property, secs., 1207-10. If the law is the other way, the defendants should have demurred to the statement of claim. The real point is, whether the Court is tied down to the question whether the man died seized. Demand or refusal have nothing to do with it. The question is whether a widow can claim damages where her husband does not die seized. The proper course, if the other side is right, was to have issued a writ under the Dower Act, and had the dower assigned.

December 21st, 1887. BOYD, C.—In the *Doctor and Student*, (a) Dial. ii. ch. 13, it is stated that at common law the widow could not recover damages for detention of

(a) *Doctor and Student*, or Dialogues between a Doctor of Divinity and a Student of the Laws of England, by William Muchall, London, 1815.

dower, but that by the Statute of Merton, when the husband dies seized, she shall recover damages, which is understood the profits of the land since the death of her husband, and such damages as she hath by the forbearing of it. But if the husband died not seized, she shall recover no damages by the law. The doctor, however, goes on to argue that she ought, in conscience, to have the profits from the death of her husband, and in substance takes the position thus stated in *Jenkins*: (b) "If the husband does not die seized, after *her* demand and the tenant's refusal to assign dower to her, she shall recover damages from the time of the refusal: *Cent.* 1, case 85." Park approves of this law, citing these authorities: *Dower*, p. 302. However, at p. 332, he writes, "it seems that Courts of Equity following the analogy to damages under the Statute of Merton, will not entertain a bill for mesne profits, when the husband did not die seized," for this citing *Delver v. Hunter*, Bunbury, (Exch. R.) 57.

In *Dyer*, (c) 284, (33) *a.* it is noted: "The common practice is, and the precedents of the Common Pleas are, that a woman demandant in dower shall not recover any damages, unless the husband died seized, and this by the Statute of Merton, ch. 1."

The passage from *Jenkins* was cited, and expressly overruled by the Court of Exchequer in *Jones v. Jones*, 2 Tyr. 534 (not so fully reported in 2 C. & J. 601,) and this case was followed by Mowat, V. C., as binding upon Courts of Equity, in *Losee v. Armstrong*, 11 Gr. 517. There is, besides, a direct holding upon the very point in question in *Dayton v. Auldjo*, 6 O. S., 143, which ought not now to be varied, in which the Court affirms the law that damages can only be given when the husband died seized. They say further, "As to the idea that if a demand be made damages may be recovered after such demand, though the husband did not die seized, that seems not tenable."

(b) *Eight Centuries of Reports*, or eight hundred cases solemnly adjudged in the Exchequer Chamber, or upon Writs of Error, by Judge Jenkins, 3rd ed., London, 1777.

(c) *Reports of Cases in the reigns of Hen. VIII., Edw. VI., Q. Mary, and Q. Eliz.*, taken and collected by Sir James Dyer, Knt., London, 1794.

The plaintiff, therefore, has no right to recover damages, and if not damages, no costs, because she might have had her dower on the admission of the defendant. The defendant might have raised this contention at an early stage; as in the statement of claim it was pleaded that the husband did not die seized, and for this reason I think judgment should go for dower simply, and no costs be given to or against either party.

FERGUSON, J., concurred.

A H. F. L.

[CHANCERY DIVISION.]

GOULDING V. DEEMING.

Fraudulent preference—Chattel mortgage—Security on future-acquired property to secure future advances in goods—Simultaneous mortgage on same property to secure past indebtedness—R. S. O. ch. 119, sec. 6—48 Vict. ch. 26, sec. 2 (O.)

A mortgage by an insolvent person on future-acquired chattels to secure the repayment of the price of such chattels to the vendor thereof is binding, notwithstanding 48 Vic. ch. 26, sec. 2 (O.)

On April 26th, 1886, M. A. V., in pursuance of a written agreement of the same date, gave a mortgage to the plaintiffs on her furniture and stock in trade, present and future, to secure advances of goods to be made by the plaintiffs within seven months, to the extent of \$1,000 in value; and at the same time she executed a mortgage on the same goods to secure a past indebtedness to the plaintiffs. The advances were made, pursuant to the mortgage, to the extent of about \$600. M. A. V. was insolvent at the time, but not to the knowledge of the plaintiffs, and the transaction was an honest one throughout. Over a year after the goods were seized in execution by the defendant. At that time the past indebtedness secured by the mortgage relating thereto had all been paid off. It did not appear that the payments were made out of the new goods.

Held by the Divisional Court, upon the evidence, that there were two agreements—one to secure a past indebtedness, and the other to secure the future advances; and that the mortgage to secure future advances was a valid security within sec. 6 of R. S. O. ch. 119.

Held, also, that the transaction had not the effect of giving a preference under 48 Vic. ch. 26, sec. 2.

It was not void under 48 Vic. ch. 26, sec. 2, for substantially it was given by way of security for a present actual *bonâ fide* sale and delivery of goods, within the exception to that section; and it was not a preference of the plaintiffs over other creditors, as but for it the plaintiffs would never have become creditors at all; and there was no question, under sec. 3 (1), as to the goods bearing a fair and relative value to the consideration therefor, inasmuch as it was not an absolute conveyance or transfer, but a mortgage, and would attach only to the exact extent to which value was given therefor, by the delivery of goods.

Per PROUDFOOT, J.—The “advances” referred to in R. S. O. ch. 119, sec. 6, need not be pecuniary.

Coyne v. Lee, 14 A. R. 503, cited and followed.

THIS was a motion by way of appeal to the Divisional Court from the judgment of Rose, J., on the trial of an interpleader issue, wherein George Goulding, William Goulding, and John Henry Goulding (plaintiffs), affirmed, and Susan Deeming (defendant) denied that certain goods claimed by the plaintiffs, to wit, all the millinery, stock in trade and goods in the store of Mary Alice Vanzant, and

the piano and household goods and furniture in the dwelling-house of the said Mary Alice Vanzant, and which on August 10th, 1887, were seized in execution by the sheriff of the county of Essex under a writ of *feri facias* tested July 23rd, 1887, and issued out of the Chancery Division upon a judgment recovered by Susan Deeming against Mary Alice Vanzant and one George W. Deeming were, or some part thereof was, at the time of the said seizure, the property of the said plaintiffs as against the said Susan Deeming,

The trial took place at Sandwich on October 12th, 1887.

Akers for the plaintiffs.

Douglas, Q.C., for the defendant.

It appeared that the plaintiffs claimed under a chattel mortgage which was executed on 26th April, 1886, pursuant to a written agreement of the same date, by Mary Alice Vanzant; under the circumstances mentioned in the judgment of Rose J.

The mortgage in question was upon the furniture and stock in trade, present and future, of Mary Alice Vanzant. It recited that, "whereas the said mortgagor has requested the aid of the mortgagees to advance to her for the purposes of her business as a milliner and dressmaker, goods and merchandize to the value of \$1,000; such advances to be made within seven months from the date of these presents, and the price of such goods and merchandise to be paid by said mortgagor to said mortgagees within four months from the date of the respective deliveries of such goods, such advances to be secured by these presents: and the said mortgagees have consented and agreed to make such advances on security of these presents to the extent of the said \$1,000 to the said mortgagor for the purpose of her business as a milliner and dressmaker, such advances to be made within seven months from the date of these presents, and to be repaid as hereinafter agreed between the parties hereto, but all to be repaid

within four months from the date of the respective deliveries of such goods."

The proviso for redemption was, "that if the mortgagor, her executors or administrators do, and shall, well and truly pay or cause to be paid unto said mortgagees, their executors, administrators, or assigns, the full price of all goods and merchandise to be sold and delivered by said mortgagees to said mortgagor within four months from the delivery of such goods and merchandise as the same shall mature, to the extent of \$1,000; all such goods and merchandise to be sold and delivered within seven months from the date of these presents, and all such payments to be made within eleven months from the date of these presents (all overdue payments to bear interest at seven per centum from maturity until paid,) then these presents and every matter and thing herein contained, shall cease, &c." And the covenant for payment was, that the mortgagor "will well and truly pay or cause to be paid unto said mortgagees, their executors, administrators and assigns, the full price of the goods and merchandise in the above proviso mentioned within four months from the delivery thereof, all such payments to be made within eleven months from the date of these presents, and will pay interest as above."

Goods were supplied thereunder from time to time up to November 12th, 1886, to the value of \$620.75. Mrs. Vanzant prosecuted her business, as a milliner and dealer in dry goods and fancy goods until August 10th, 1887, when the sheriff seized. The evidence shewed that she was insolvent when the mortgage was given, but not to the knowledge of the plaintiffs. There was no evidence of fraud, the transaction, so far as appeared, having been an honest one throughout.

The moneys realized upon sales made after the mortgage in question was executed, were applied in payment of the past indebtedness of Mrs. Vanzant to the Gouldings, and at the time of the seizure by the sheriff, the old indebtedness was paid off, and the new alone remained. It did not

appear that any part of the past debt was paid for out of the new goods.

Payment of this past indebtedness had been secured to the plaintiff by Mrs. Vanzant by a separate chattel mortgage upon identically the same chattels (present and future) bearing the same date as the chattel mortgage in question.

The future-acquired property was referred to in the schedule attached in the chattel mortgages, thus: "Thirdly, all the stock in trade and fixtures of the said mortgagor of a like nature to those hereinbefore firstly described, the property of the said mortgagor, which from time to time may hereafter during the currency of these presents be brought into and upon the said shop and premises of the said mortgagor, for the purposes of her trade as a milliner and dressmaker and dealer in dry goods and fancy goods, or into any other shop and premises hereafter to be occupied by said mortgagor, and to which her stock in trade may hereafter be removed; it being understood and agreed between the parties to the hereunto annexed chattel mortgage, that all goods added to or substituted for said stock in trade by said mortgagor, shall be covered by the said chattel mortgage as effectually as if same were now in or upon said shop and premises."

On November 14th, 1887, Rose, J., gave the following judgment:

ROSE, J.—Mr. Douglas's objections to the validity of the mortgage as being contrary to the provisions of 48 Vic. ch. 26, (O.), and the Chattel Mortgage Act, it being a mortgage to secure future advances, are, I think, with one exception, disposed of by the decision in *Coyne v. Lee*, 14 A. R. 503.

If a mortgage on future acquired property to secure an indebtedness in respect to property purchased prior to the date of the mortgage is to be upheld, it would seem that *a fortiori* a mortgage upon such future-acquired property to secure its purchase money must be declared valid.

That case, however, does not dispose of the objection that the whole agreement does not appear in the writing produced, and that it is not fully recited in the mortgage.

The mortgage in question was given under the following circumstances :

In April, 1886, Mrs. Vanzant being, as I find to have been the fact, in insolvent circumstances, and unable to pay her debts in full, was written to by the plaintiffs and requested to come to Toronto to see them. Upon her arrival she was told she could not have more goods unless she gave security. To use the language of the plaintiff: "She came down in April to select some goods, and we didn't care to let her have them without getting security."

"Q. How did you come to ask her for security? A. Because the account was as large as we cared to have it."

Mrs. Vanzant said: "I never thought of giving the Gouldings a chattel mortgage until they refused to give me more goods unless I gave them security."

Mrs. Vanzant agreed to give security for past indebtedness and for future-advances. To copy again the language of the plaintiff from his examination: "I said we would have to get a chattel mortgage if she wanted more goods. Q. You knew at that time she was a pretty heavy debtor of yours? A. Yes; we knew the account was as large as we cared to have it without getting security. Q. What did she say in answer to that? A. I forget, but she was willing to do it. Q. Tell me as near as you can what she said? A. I don't remember. I turned her over to Mr. Marriott, the book-keeper. She was willing to give a chattel mortgage."

The book-keeper went with her to the solicitor's office, where were drawn a chattel mortgage to secure the past indebtedness and an agreement in writing, which was recited in a second chattel mortgage to secure future advances. The instruments were dated the 26th April, 1886.

In neither the agreement nor the mortgage is mentioned the security for the past indebtedness.

There is nothing in the evidence to shew me that the agreement to make future advances was made in the *bond fide* belief that such advance would enable Mrs. Vanzant to continue her trade or business, or to pay her debts in full. Moreover, it will be observed that the advance spoken of in 49 Vic., ch. 25, sec. 1, (O.), is an advance in money.

I refer to this section because if there had been but one instrument, and it a security for past indebtedness, as well as for future advances, and it were attacked under ch. 26, Vic. 48, (O.), prior to the past indebtedness being paid off,

it would probably have been held absolutely void as not coming within any of the exceptions. Whether it could be upheld after the past indebtedness had been paid off, may yet require consideration.

As a matter of fact the moneys realized upon the sales made after the instruments above mentioned were executed, were applied in payment of the past indebtedness, so that at the time of the seizure upon which this issue was raised the old indebtedness was paid off and the new alone remained.

Mr. Douglas contends that the mortgage, to secure future advances, should have recited what in fact, as he contends, was the whole agreement. That the agreement in writing produced was not in fact the whole or full agreement, but that the transaction was one, viz., that in consideration of receiving security for past indebtedness and future advances the plaintiff agreed to make future advances.

I have no doubt, and find as a fact, that the agreement was one and entire, and that the agreement to supply goods for the future would not have been entered into had not Mrs. Vanzant agreed to give security for past as well as future indebtedness. In other words, the consideration for the plaintiff's promise to furnish further goods was the agreement on the part of Mrs. Vanzant to give security for past as well as future indebtedness.

Barber v. Macpherson, 13 A. R. 356, was relied upon as a clear authority that the whole or true agreement must appear in writing, and be fully recited in the mortgage.

There appears here in form what satisfies the statute literally, namely, "*an* agreement in writing for future advances," but in fact not *the* real or true agreement. There is no reason why the fact of the agreement to secure the past indebtedness should not have been recited, and so far as appears the want of such recital in no wise affects the creditors or the public prejudicially. Full information is afforded as to the amount of liability intended to be created and for which the mortgage is given, but I cannot say that the mortgage "sets forth fully by recital or otherwise the terms, nature, and effect of *the* agreement."

I confess my impression is in favor of the objection, but if I am to construe the language of the section thus literally against the mortgagees must I not construe it with equal literalness in their favour? If so, this mortgage is not within the sec. 6 of ch. 119, R. S. O., for that section in

terms only applies to "an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of repayment thereof not being longer than one year from the making of the agreement."

Now this agreement was not for the purpose of enabling the borrower to enter into business at all, but merely to carry on business with such advances.

Such a construction as suggested may be held to be too narrow, but if the section, as a whole, is to be construed with such liberality as would enable the Court to hold that the section applies to a mortgage to secure indebtedness for future advances to enable the borrower to carry on business, then the same spirit of liberality would, I think, support a mortgage which recites an agreement that shews on its face all the liability which it was intended to cover.

I do not know of any case where the exact point has arisen. It was raised in *McLean v. Pinkerton*, 7 A. R. 490, but on a different state of facts. That case decided that adding a provision for securing future advances to a mortgage securing past indebtedness would not take the whole mortgage out of the section.

There remains the further question raised in *Sutherland v. Nixon*, 21 U. C. R. 629, by McLean, C.J., as to whether the section applied to any but advances in money. The learned Chief Justice gave his reasons for thinking that it applied only to advances in money, while Burrs and Hagarty, JJ., contented themselves with simply expressing a contrary opinion. The force of the words "the time for repayment thereof," "for securing the mortgagee repayment of such advances," when considered literally is so great as to require a very liberal construction to make them apply to advances in goods, or rather to an agreement to supply goods in the future, the payment of the price of which is to be secured by a chattel mortgage. Such liberality of construction would, I think, enable me to support the mortgage in question.

The result is, that if the section is to be construed literally, and with exactness, so as to require the agreement in writing not to omit any of the terms orally agreed upon, whether or not such terms had reference to the amount of liability covered or to be covered by the mortgage, the same literal exactness would exclude this mortgage from the operation of the section, and on the other hand, if the

section is to be so liberally construed as to permit the Court to disregard the words "to enter into," "repayment thereof," and "repayment of such advances," the same liberality would support this mortgage.

On the whole I must find that at the time of the seizure the goods in question were the property of the plaintiff as against the defendant.

The defendants appealed from the judgment generally, and the plaintiffs served a notice of motion by way of cross-appeal from that portion of the cross judgment, finding that Mary Alice Vanzant was in insolvent circumstances when she executed the chattel mortgage, and also from the finding that the agreement and mortgage in question did not contain the whole agreement on which such mortgage was given in accordance with the Chattel Mortgage Act.

The motions came on for argument on December 7th, 1887, before Boyd, C., Proudfoot, and Ferguson, JJ.

H. J. Scott, Q.C., for the defendant. We attack the mortgage under 48 Vic. ch. 26, sec. 2, and 49 Vic. ch. 25. It had the effect of giving a preference: *River Stave Co. v. Sill*, 12 O. R. 557; *Rae v. McDonald*, 13 O. R. 352. If a man is insolvent he cannot give security unless under the excepting clauses of 48 Vic. ch. 26. *McLean v. Garland*, 13 S. C. R. 366, is distinguishable. See, also, *Clarkson v. Rothwell*. Had this transaction the effect of defeating, &c., the claims of creditors: *Coyne v. Lee*, 14 A. R. 503. The chattel mortgage was also invalid under the Chattel Mortgage Act, R. S. O. ch. 119. It was intended to be drawn under section 6, and it should have set forth fully the terms, nature, and effect of the agreement. The parties themselves carried it out by way of two mortgages. They put the past debt in one and the future debt in the other. It should all have been in one: *Barber v. Macpherson*, 13 A. R. 356; *Sutherland v. Nixon*, 21 U. C. R. 629, as to entering into and carrying on business: *Baldwin v. Benjamin*, 16 U. C. R. 52; *Turner v. Mills*, 11 C. P. 366.

Akers for the plaintiffs. Sec. 6 relates only to future advances. *Barber v. Macpherson*, 13 A. R. 356, is distinguishable. I refer also to *Kitching v. Hicks*, 6 O. R. 739; *Paterson v. Maughan*, 39 U. C. R. 371; *Baldwin v. Benjamin*, 16 U. C. R. 52; *Mathers v. Lynch*, 28 U. C. R. 354; *Hamilton v. Harrison*, 46 U. C. R. 127; *Steinhoff v. McRae*, 12 O. R. 546; *Risk v. Sleeman*, 21 Gr. 250.

Scott, in reply. On the question of insolvency see *Warnock v. Kleopfer*, 14 O. R. 288; *Clarkson v. Sterling*, 14 O. R. 460; *The Dominion Bank v. Cowan*, 14 O. R. 465; *Rae v. McDonald*, 13 O. R. 352.

December 21st, 1887. BOYD, C.—I feel no difficulty in this case as to the application of the Chattel Mortgage Act. The provisions of sec. 6, R. S. O. ch. 119 were complied with. There was an agreement in writing for future advances, which is correctly embodied in the mortgage, and I do not draw the same conclusion from the evidence as my brother Rose that it was a part of the agreement for the future supply of goods that security for the past dealings should be given. Such security was given no doubt at that time, and it was represented by a separate instrument of the same date, which has been paid in full out of the profits of the business. But the parties went to a lawyer, had their bargain as to future dealings put into writing, and there is nothing in the evidence, coupled with the admissions made, to shew that this writing does not fully express all that was agreed to as to future advances.

Upon the other branch, the effect of the Fraudulent Preference Act as applied to the special facts of this case has to be considered. The mortgage was made on April 26th, 1886, upon furniture and a piano and stock in trade, present and future, of Mrs. Vanzant, the judgment debtor. It was to secure advances in goods to be made within seven months, and to the extent of \$1,000. Goods were supplied thereunder from time to time up to November 12th, 1886, and in value to the sum of \$620.75. Mrs. Vanzant prosecuted her business till August 10th,

1887, when the sheriff seized under the Deeming execution. The debtor, Mrs. Vanzant, appears to have been insolvent when the chattel mortgage was given, but not to the knowledge of the Gouldings. No fraud is found by the judgment, and so far as appears the transaction was an honest one throughout. Before the amendment introduced by 48 Vic. ch. 26, sec. 2, the transaction could not be impeached by a subsequent execution creditor. Apart from fraud then, *has* this transaction the effect of defeating or delaying creditors or of giving the Gouldings a preference over the others within the meaning of the amended Act? The effect of the dealing so far as the present execution creditor is concerned was to give the Gouldings security to the extent of \$620.75, *i.e.*, the value of the goods actually and *bond fide* supplied upon the chattels and stock in trade of Mrs. Vanzant. Without this security the Gouldings would not have made these advances of goods. But as it was, the goods to this extent passed from their warehouse to the shop of Mrs. Vanzant, and to that extent increased her assets. In substance such a transaction is protected by the saving clause of the Act, which excepts from its operation any conveyance which is made by way of security for any present actual *bond fide* advance of money or sale or delivery of goods. Here the chattel mortgage became operative only as and when the consideration therefor from time to time arose by the delivery of the goods pursuant to the agreement therefor, and it is then attached upon the chattel property only to the extent of the actual value of the goods supplied from time to time. There was no defeating of the creditors by this arrangement, for the pecuniary interest of the debtor, Mrs. Vanzant, in the goods and chattels, remained the same, and as an equity of redemption it was exigible for her creditors. The burden imposed by the mortgage was represented and counterbalanced by an equivalent increase in her stock of goods. Nor was this a preference given to the Gouldings over the other creditors, because it was of the essence of the transaction that the Gouldings should not become her creditors unless on the

terms of being protected by this security. The Act is levelled at a case where all creditors being on an equal footing, one by means of a security gets an advantage over the others. But here the Gouldings were not on a par with the others at the outset, and but for the protection of this security they would not have become her creditors at all in respect of this \$620.

No question arises, as I view the matter, on the last proviso in 48 Vic. ch. 26, sec. 3, (1) which reads, "provided that the money paid on the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor." That is directed to a case where there is a transfer or conveyance of property in form absolute, and of greater value than the value of what is given therefor. But here, as the security was a mortgage, it would attach only to the exact extent to which value was given therefor by the delivery of goods.

The result is, that the judgment should be affirmed, with costs.

PROUDFOOT, J.—The learned Judge held that all the objections to the validity of the mortgage as being contrary to the provisions of the Chattel Mortgage Act and of 48 Vic. ch. 26, (O.), were, with one exception disposed of by the decision in *Coyne v. Lee*, 14 A. R. 503.

That exception was, that it did not dispose of the objection that the whole agreement did not appear in the writing produced, and that it is not fully recited in the mortgage.

The value of that objection is said to depend upon whether there were two agreements, one as to the past, the other as to the future indebtedness, or only one agreement. The learned Judge held that there was only one agreement. I am unable to come to that conclusion upon the evidence. The two chattel mortgages were indeed executed upon the same day, but they seem to have been the result of different agreements, one having reference to the past indebtedness, the other to that about to be incurred. Besides the

general language quoted by the learned Judge from Mrs. Vanzant's evidence, she says: "I wanted more goods to keep my stock, and Mr. Goulding said that he could not risk his goods, and he would require security for future advances of goods." That refers to one agreement. The mortgages do not refer to each other, and the agreement for security for future advances does not refer to the mortgage for the past debt.

But upon the supposition that there was only one agreement, and that as regards the past debt it was void, the case of *Kitching v. Hicks*, 6 O. R. 739, has decided that the security is not void entirely, but that the good part may be separated from the bad part.

The past debt was all paid off as the notes given for it matured; the last of these matured on August 18th, 1886; the whole amounted to \$912.69. But under the agreement for further advances of goods it seems that goods to the amount of \$106 were advanced on April 26th, 1886, and no further goods were furnished till September 9th. And it does not appear that any part of the past debt was paid out of the new goods. The mortgage for the past debt having been paid, it may be removed from consideration.

There is no doubt that *Coyne v. Lee*, following a long line of decisions, has determined that a security may be given upon property to be acquired in future. And the case of *Re Thirkell, Perrin v. Blake*, 21 Gr. 492, is approved, in which Blake, V. C., said, at p. 506: "Although at law it may be necessary to have the *novus actus*; in equity, where the property comes into the possession of the mortgagor, it is at once operated upon by the instrument, and is effectually charged as against a subsequent assignee or a judgment creditor." And the learned Chief Justice of Ontario says in *Coyne v. Lee*, 14 A. R. at p. 509: "It remains to be considered whether any Ontario legislation interferes with these views. I cannot find anything in our Acts which can in any way affect the question as to this after-acquired property." Immediately upon any goods being furnished by

Goulding & Co. to Mrs. Vanzant they were at once affected by the mortgage security.

Numerous decisions have determined that a chattel mortgage upon future goods is not within the Chattel Mortgage Act, R. S. O. ch. 119, as they are not capable of immediate delivery, and as to them it did not require registry. But the present mortgage covered these existing goods, and to give a valid security upon them it required registry; and it was accordingly duly registered and renewed. It has been questioned whether that Act sanctioned a mortgage as a security for advances other than in money. In *Sutherland v. Nixon*, 21 U. C. R. 629, McLean, C. J., thought it did not, but Burns and Hagarty, JJ., thought it did, and I agree with them.

It remains to be considered whether the transaction offends against the provisions of 48 Vic. ch. 26, (O.), which avoids gifts or transfers of property made by insolvents which defeat or prejudice creditors. I think the learned Judge who tried this case was right in concluding that Mrs. Vanzant was insolvent. The 3rd section of this Act protects any transfer of goods made *bondâ fide* in consideration of any present actual sale or delivery of goods. As the mortgage upon future goods took effect, as we have seen, immediately upon the delivery of the goods to the purchaser, it then became a security for a present sale or delivery, and created an effectual charge upon them as well as upon the other goods embraced in the security. And the security is protected by that 3rd section.

I think, therefore, that the plaintiffs have a valid security upon the goods embraced in the mortgage, and that these goods were the property of the plaintiffs as against Susan Deeming, the execution creditor, on August 10th, 1887, when they were seized by the sheriff.

FERGUSON, J.—I am also of the opinion that the judgment appealed from should be sustained, and for the reasons given by the Chancellor, with whose judgment I agree.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

TRAVERSY V. GLOUCESTER.

Municipal corporations—Bridge—"Approaches"—Meaning of—Liability of local municipality not taken away by sec. 530 of the Municipal Act.

Sec. 530 of the Municipal Act, 46 Vic. ch. 18, (O.), provides that "the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by the local municipalities in which they are situate."

The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within 100 feet from the end of the bridge, but it was not shewn that there was any artificial structure to enable the public to pass from the road on to the bridge and from the bridge on to the road which would cover the point where the accident occurred.

Held, reversing the judgment of ROBERTSON, J., at the trial, dismissing the action.

1. That the word "approaches," in the section, means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not include the highway to the distance of 100 feet from each end of the bridge, at all events, unless the artificial structures extend so far.
2. That in any case sec. 530 does not relieve the local municipality from its statutory liability to repair, but merely gives to such municipality the right to enforce its provisions against the municipality or municipalities owning the bridge.

THE plaintiff sued for injury sustained by the death of her husband caused, as alleged, by the non-repair of certain roads in the defendant township, one leading from Cumming's bridge to the village of New Edinburgh, and crossing over lot, No. 5, in the Ottawa and Rideau Junction Gore, and commonly known as the Russell road, and the other from Beechwood Cemetery to St. Patrick street bridge. These roads, as travelled, run practically at right angles to each other, and cross each other at a point within one hundred feet of the St. Patrick street bridge, that bridge being on the direct line of the road from the Beechwood Cemetery; and the whole of the ground occupied by the intersection of these roads is within one hundred feet

of the St. Patrick street bridge, and the place where the deceased met his death was upon the ground occupied by such intersection, and he so met his death while going from Beechwood Cemetery to the St. Patrick street bridge, and intending to cross such bridge into the city of Ottawa.

The St. Patrick street bridge is a bridge across the river Rideau, where that river forms the boundary line between the city of Ottawa and the county of Carleton, and such bridge is required by law to be erected and maintained by the councils of the city and county. See 46 Vic., ch. 18, sec. 535; 48 Vic., ch. 39, sec. 22, and *Regina v. County of Carleton*, 1 O. R. 277. The case was tried at Ottawa before Robertson, J., and a jury.

Upon this state of facts the learned Judge, the defendants' counsel insisting upon and taking the responsibility of that course being adopted, dismissed the action, upon the ground that by reason of the provision of section 530 of 46 Vic. ch. 18 (O), the liability to repair that part of the roads where the deceased met his death was upon the councils of the city and county, and that the defendant corporation was thereby relieved of its liability to repair that part of the said roads.

December 5, 1887. *Shepley* moved to set aside the judgment and for a new trial, and *J. K. Kerr*, Q. C., shewed cause.

February 6, 1888. ARMOUR, C. J.—Apart from the statutory provision 46 Vic. ch. 18 sec. 530, there was evidence to go to the jury that these roads were roads which the defendant corporation was liable to keep in repair, and that at the place where the deceased met his death they were out of repair, and that the deceased met his death by reason of their being out of repair. See *Regina v. Inhabitants of the County of Southampton*, 19 Q. B. D. 590. This provision is as follows: "The approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or muni-

cipalities, shall be kept up and maintained by such municipality or municipalities; the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate."

What is the meaning to be attached to the word "approaches" in this provision? It has no legal signification and is incapable of exact definition. They are to be "kept up and maintained." The term is again used in 47 Vic. ch. 32, sec. 17 (O.), where it is provided that "the corporation shall, in the absence of any agreement to the contrary, keep in repair all crossings, sewers, culverts, and approaches, grades, sidewalks, and other works made or done by the said council of any municipality, &c., &c." It is not the highway that is to be "kept up and maintained," but merely the "approaches;" and they are to be "kept up and maintained" for 100 feet to and next adjoining each end of all bridges, &c., 100 feet in length, I presume. But to what width? As wide as the bridge probably; and if wider, how much wider? If no "approaches" are required, are they nevertheless to be "kept up and maintained?" If "approaches" are required, but not for 100 feet, but for a far less distance, are they nevertheless to be "kept up and maintained" for the whole 100 feet? I think that the proper meaning to be attached to the word "approaches" in this provision is such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road to the bridge, and from the bridge to the road. If no such artificial structures are required for that purpose, there is, in my opinion, no liability to keep up and maintain any. If such artificial structures are required, but not to the extent of 100 feet, the liability is only to keep up and maintain them to the extent to which they are required.

I do not, however, think that the effect of this provision is at all to relieve the "local municipalities" from their liability under section 5.1 of 46 Vic. ch. 18 (O.), but that their liability under that section still continues notwithstanding this provision. They have the right to enforce this pro-

vision against the bridge owners, but to the public they still remain liable under section 531, and I think this is apparent from a consideration of this provision.

The roads upon which the approaches are to be made are not vested, nor are the approaches vested in the bridge owners, nor are they given jurisdiction over the roads or over the approaches, but the roads and approaches still remain vested in and under the jurisdiction of the "local municipalities." The bridge owners are not to keep in repair the roads or approaches, but only to keep up and maintain the approaches, nor are they made responsible civilly or criminally in express terms for neglect to keep up and maintain such approaches.

I refer to 22 Henry 8th, ch. 5, sec. 9; *Rex v. Inhabitants of St. George, Hanover Square*, 3 Camp. 222; *Rex v. Netherthong*, 2 B. & Ald. 179; *Rex v. Oxfordshire*, 4 B. & C. 194; *Rex v. Brightside Bredow*, 13 Q. B. 933; *Rex v. Sheffield Canal Co.*, 13 Q. B. 913; *Tierney v. Troy*, 41 Hun. 120.

No evidence was given that any approaches to the St. Patrick street bridge had ever been kept up or maintained to any extent, or that any such were necessary, and the evidence would rather lead one to the conclusion that none such were necessary, or at all events to such an extent as to cover the place where the deceased met his death.

In my opinion, therefore, there must be a new trial, and the costs of the trial already had, and of this motion, must be paid by the defendants immediately after the taxation thereof.

FALCONBRIDGE, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

ADAMS V. THE WATSON MANUFACTURING CO., (LIMITED.)

Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 Vic. ch. 26 (O.)—Rights of assignee—Fraudulent preference—Amendment—Rule 103.

The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vic. ch. 26 (O.), for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and also the interest of R. & Co. in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same.

The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold were remitted to H. & Co., to whom they had been assigned by R. & Co.

At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The learned Judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties.

The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference.

He'd, 1. That these questions were "questions involved in the action" within the meaning of Rule 103, having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule, but that the amendment must be confined to the plaintiff's possible rights.

2 That by sec. 7 of 48 Vic., ch. 26, E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. which assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void: that the plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent.

FALCONBRIDGE, J., *dubitante*, as to the disposition of costs.

THE plaintiff alleged in his statement of claim that John Russell, John W. Russell, and John McKellar, formerly

carried on business under the name of John Russell & Co., at Ingersoll, as iron founders and manufacturers of agricultural implements, and that the defendants were an incorporated company manufacturing and dealing in agricultural implements, and having offices at Ayr, in this Province, and at Winnipeg, in Manitoba: that the defendants had purchased implements from John Russell & Co., prior to 29th May, 1885, and at that date the amount of machinery in the defendants' hands belonging to John Russell & Co. was \$732: that between that date and 10th July, 1885, the defendants bought from John Russell & Co., further goods to the amount of \$20.91, making in all \$752.91, on which they paid \$317, leaving a balance of \$435.91 still due John Russell & Co.: that on the 2nd December, 1885, the defendants ordered from John Russell & Co. goods to the value of \$717.67, which were delivered to them: that on the 15th January, 1886, the firm of John Russell & Co. dissolved partnership, and John McKellar retired from the firm, and assigned his interest in its assets to the continuing partners, John Russell and John W. Russell, who continued to carry on business under the same firm name of John Russell & Co.: that about 18th March, 1886, the new firm of John Russell & Co. made an assignment to William Ewart, of Ingersoll, for the benefit of their creditors, under the Act of 1885, and that Mr. Ewart, as assignee, became entitled to the debt of \$1,153.58 due, as above mentioned, from the defendants to the assignors: that the assignee sold this account of \$1,153.58 by auction to the plaintiff, and in pursuance of the sale assigned it by deed to the plaintiff, and the plaintiff claimed the amount of it from the defendants.

The defendants, by their statement of defence, said that the implements mentioned in the statement of claim as having been purchased prior to December 2nd, 1885, were not purchased by them, but were consigned to them by John Russell & Co., for sale and with instructions to account to that firm for the proceeds; and that before any of the implements had been sold the consignors

assigned the proceeds to be derived from them to Messrs. Adam Hope & Co., of Hamilton, to secure payment to them of the price of goods which they were about to sell to Messrs. John Russell & Co., and that all the proceeds derived from the sale of these goods, were from time to time remitted to Messrs. Adam Hope & Co.; and with regard to the consignment of December 2nd, 1885, they said that John Russell & Co., being desirous of purchasing iron from Adam Hope & Co., made that consignment to the defendants with special instructions to sell the implements consigned, and to transmit the proceeds to Adam Hope & Co., in payment of the iron so purchased: that this was part of the agreement under which Adam Hope & Co. sold them the iron, and that all the proceeds derived or to be derived from the sales of the implements consigned were claimed by Adam Hope & Co.; and they submitted that they were not liable to the plaintiffs, and that in any event Adam Hope & Co. should be made parties to the action.

Upon these pleadings the action was tried before Galt, J., without a jury, at Woodstock, on April 22nd, 1887.

The evidence at the trial shewed that prior to the 20th November, 1884, John Russell & Co. had sold to a firm of Shore & Wilson, in Winnipeg, and had delivered to them there, a quantity of agricultural implements: that the purchasers becoming unable to pay for them had given them up to the vendors, who had requested the defendants' manager in Winnipeg to take them over and sell them as best he could for their benefit, and remit them the proceeds, keeping for his own trouble all that he realized beyond a certain price: that on the 20th November, 1884, John Russell & Co., being then indebted to Adam Hope & Co., had written the defendants' manager in Winnipeg, as follows:

“The following goods of ours which you have in stock, you will please hold from the present time, and until sold by you, in trust for Messrs. Adam Hope & Co., of Hamilton, Ont., to whom we are indebted, viz., two grain crushers,

including all land rollers and hay loaders. The proceeds of all sales of the above goods you will please keep separate from other transactions, and remit same to Messrs. A. H. & Co., from time to time. We also wish these goods to be insured for the benefit of A. H. & Co."

This letter was enclosed by Adam Hope & Co., to the defendants on the 22nd November, 1884, and defendants in reply wrote them on the 28th November, 1884, acknowledging it, and stating that in accordance with the order they would account to them for the goods when sold.

In December, 1885, John Russell & Co. appeared to have owed Adam Hope & Co. \$1,482, without deducting any remittances made at that time by the defendants to Adam Hope & Co. from the proceeds of the goods referred to in the above correspondence, and on the 2nd December, 1885, John Russell & Co. shipped to defendants at Winnipeg, a further consignment of implements, amounting to \$717.67, to be sold on account of the consignors, upon the same terms as had been arranged with regard to the goods already in the hands of the defendants. On the 4th December, 1885, John Russell & Co. wrote to the defendants directing them to pay to Adam Hope & Co. the proceeds of the goods shipped on the 2nd December, as the same should be realized, and on the 11th December, 1885, the defendants wrote to Adam Hope & Co. stating that they had received invoice of the consignment of the 2nd December from John Russell & Co., and would make returns for the same direct to Adam Hope & Co., in accordance with the instructions from the consignors.

The effect of these transactions was plainly, as between the three parties concerned, to give to Messrs. Adam Hope & Co. the right to receive the net proceeds of all sales of the goods held by the defendants to the extent of their claim against John Russell & Co., and to absolve the defendants from any obligation to account to John Russell & Co.

On 15th January, 1886, John McKellar, one of the members of the firm of John Russell & Co., retired from that

firm, and assigned to the remaining partners all his interest in the assets of the partnership, they agreeing to indemnify him against its debts, and stipulating for the right to continue the business under the same firm name of John Russell & Co.

On the 18th March, 1886, John Russell and John W. Russell, the remaining members of the firm, made an assignment for the benefit of their creditors to William Ewart.

On the 8th May, 1886, the assignee, by a deed in which it was recited that John Russell and John W. Russell carried on business as iron founders, and were possessed of certain accounts in their books, and also of accounts against various agents of the firm for stock shipped to them for sale, which were enumerated in schedule A attached to the deed: that they had become insolvent, and had assigned to the grantor their assets for the benefit of their creditors: that the accounts enumerated in the schedule, and also all the goods and chattels which were in the hands of any parties to whom they had been shipped, but which for any cause remained the property of John Russell & Co., were part of the assets of the firm, and had passed to the grantor as assignee; and that the accounts mentioned in schedule A, and also all the goods and chattels in the hands of any other persons which for any cause still remained the property of John Russell & Co., although charged to the said parties and represented by the said accounts, had been put up for sale by auction and knocked down at 13½ cents on the dollar to W. T. Buchanan, who had directed the grantor to assign them to the plaintiff, proceeded to assign to the plaintiff all the said accounts, and all the goods and chattels shipped to any of the parties named in the schedule which, at the date of the assignment to the grantor still remained the property of John Russell & Co. In the schedule attached to this deed the defendants' names appeared as debtors to the amount of \$1153.54.

On the 8th June, 1886, the plaintiff applied for payment of this sum to the defendants, who replied:

“ We do not owe nor hold any stock belonging to John Russell & Co., and therefore have no statement to render you. According as John Russell & Co. shipped us goods they also sent a letter assigning all their interest in said goods to Adam Hope & Co., ordering us to pay all proceeds, and make all returns to said Adam Hope and Co., and we having accepted those orders our liability to John Russell & Co. thereupon ceased.”

The facts as to the prior assignment to Adam Hope & Co. of the proceeds of the goods having been brought out upon the cross-examination of John McKellar, who was called by the plaintiff, the plaintiff's counsel proceeded to examine him as to the financial position of the firm of John Russell & Co. at the time of his retirement in June, 1886, and was allowed to do so subject to the defendant's objection that the question was not raised upon the pleadings. This evidence, and that of Mr. Ewart, the assignee, shewed that the firm was not able to pay its debts in full on the 4th December, 1885 : that the liabilities were \$52,000, and that the assets had only realized about \$16,000, of which all but \$1,000 had been used in paying chattel and other mortgages ; and that the total debt of John Russell & Co. to Adam Hope & Co. had been incurred prior to the 1st November, 1884.

The defendants' manager, Mr. W. W. Watson, of Winnipeg, was examined by the plaintiff, and stated that the defendants had, from time to time, remitted to Adam Hope & Co., the proceeds of the sales made by them : that on the 30th November, 1886, they had on hand \$100.35, cash, due Adam Hope & Co., and stock on hand amounting to \$454.77, these two sums representing the residue of the consignments for which they had agreed with John Russell & Co. to account to Adam Hope & Co., and mainly, if not entirely, forming part of the consignment of the 2nd December, 1884.

At the close of the case the plaintiff contended that the assignment on the 4th December, 1884, by John Russell & Co. to Adam Hope & Co., of the proceeds of the consign-

ment of the 2nd December, 1884, was a fraud upon their creditors, and asked leave to serve notice upon Adam Hope & Co., making them parties for the purpose of setting this up, and for the purpose of compelling them to account. The defendants replied that the question as to fraudulent preference could not be raised upon the pleadings, and that at all events no one but the assignee, Mr. Ewart, could set it up since the passing of 48 Vic. ch. 26, sec. 7 (O.).

The learned Judge dismissed the action with costs, upon the ground that no debt was due from the defendants to John Russell & Co. at the time of the assignment for the benefit of creditors, and refused to add Messrs. Adam Hope & Co. as parties, or to direct an account from them, upon the ground that the plaintiff had no right to contest the validity of the transfer to them in consequence of the Act above referred to.

On the 5th December, 1887, *Blackstock*, for the plaintiff, moved by way of appeal from this judgment and for an order directing judgment to be entered in favor of the plaintiff for the amount of his claim, or for an account of the goods received by the defendants from John Russell & Co. He also renewed his application to have Adam Hope & Co. added as parties-defendant, and he applied in addition for leave to add Ewart, the assignee, as a party-plaintiff, stating that the latter had consented to be so added.

Crerar, for the defendants, shewed cause.

The cases cited are referred to in the judgment.

February 6, 1888. STREET, J.—The plaintiff has entirely failed to shew that any debt ever existed at any time from the defendants to John Russell & Co., and he has clearly no claim therefore against the defendants in the character of debtors to him. He seeks, however, to retain them as defendants in the character of bailees of the residue remaining unsold of the goods consigned to them by John

Russell & Co., in which he claims a certain interest, that interest being subject to the rights of Adam Hope & Co., if the transfer to them is to be upheld, or absolute if that transfer is set aside as a fraudulent preference: in either view, Adam Hope & Co. are necessary parties, and the pleadings must be re-cast in order to raise the questions which the plaintiff desires to raise by making them parties.

It was urged by counsel for the defendants that these questions are not "questions involved in the action," within the meaning of O. XII., R. 15, under which the amendment is sought, and that this action should therefore simply be dismissed, the plaintiff being left to seek his remedy, if any, in a new action.

I have referred to the case of *Attorney General v. Corporation of Birmingham*, 15 Ch. D. 423, cited in support of this contention, and also to the cases of *Dalton v. Guardians of St. Mary Abbots*, 47 L. T. N. S. 349; *Walcott v. Lyons*, 29 Ch. D. 584; and *McGwin v. Fretts* 13 O. R. 699, bearing upon the same point.

In view of the fact that it appeared from the evidence of John McKellar, at the trial, that the defence to this action was undertaken and conducted throughout for the defendants by Adam Hope & Co. through their own solicitor, and that the transfer to Adam Hope & Co., which the plaintiff desires to attack was set up by the defendants in their statement of defence, I do not think we should be travelling beyond the scope of the order in holding either that the extent of the interest of Adam Hope & Co. in the goods which were the subject of the transfer, or the validity of the transfer itself, are "questions involved in the action," and that the plaintiffs should be allowed to add the parties whose presence before the Court is necessary for the final determination of those questions.

The amendments to be made must, however, be confined within the limits of the plaintiff's possible rights, and the evidence before us is sufficient to enable us to define those limits.

The application in effect is, that, having made Adam Hope & Co. defendants, the plaintiff may be allowed to reply to the statement of defence, first, that the transfer, set up in it, to Adam Hope & Co., is void as a fraudulent preference; and if not, second, that the plaintiffs are, at all events, entitled to an account from them of the amount of their claim, and of the moneys they have received on account of it, and to a judgment in the nature of that ordered in a redemption suit.

Any right which the plaintiff may have to attack the transfer to Adam Hope & Co. as a fraudulent preference must be derived under ch. 26 of 48 Vic., the 2nd section of which provides that "every transfer * * of any goods, chattels, or effects * * or of any other property * * made by any person at a time when he is in insolvent circumstances, or unable to pay his debts in full, with intent to defeat * * his creditors, or to give to any one or more of them a preference over his other creditors * * or which has such effect, shall, as against them, be utterly void."

The alleged preferential transfer is good as between the parties to it, and void only as against the creditors of the transferors. The transferors were John Russell, John W. Russell, and John McKellar, trading under the name of "John Russell & Co." After making the transfer which the plaintiff proposes to attack, John McKellar assigned his interest in the partnership assets, subject to the partnership debts, to the two other partners, who undertook with him to pay the debts, and continued the business under the same firm name, until they assigned to Ewart for the benefit of their creditors.

Under the 7th section of the above Act, Ewart then became the only person entitled to enforce the right, if any, of the creditors of the assignor to set aside the transfer to Adam Hope & Co., and it becomes necessary to consider whether any such right existed, because the right of the plaintiff cannot be greater than that of Ewart through whom he claims.

I am satisfied that no such right ever did exist in Ewart, because the right of action vested in him by the statute was the right of action on behalf of the creditors of the new firm of John Russell & Co., which was composed of two members, and which had not made the transfer sought to be attacked. He never had vested in him the right of action on behalf of the creditors of the original firm of John Russell & Co., which was composed of three members, and was the firm which made the transfer in question. The debts due by the original partnership are not the separate debts of the individual members of the partnership, and could not be proved against the new partnership: *Moorehouse v. Bostwick*, 11 A. R. 76. The two estates are distinct, and the creditors of the original firm, not the creditors of the new firm, are those against whom, and against whom only, a fraudulent preference by the original firm is to be declared void.

I am of opinion, therefore, that the plaintiff should have leave to amend by adding Adam Hope & Co. as defendants, but that his rights against them should be limited to a right to an account of their debt, and of the moneys they have received on account of it, and a right to obtain from the defendants, the Watson Manufacturing Company, the unsold goods so soon as the debt due Adam Hope & Co. shall be satisfied; but as a condition precedent to being allowed to amend the plaintiff must, within ten days after taxation, pay the defendants, the Watson Manufacturing Co., the whole of their costs down to and inclusive of the taxation, and in the event of their failing to do so, the action is to be dismissed, with costs. The plaintiff should also have leave, if he desire to do so, to add the assignee, Ewart, as a co-plaintiff, upon filing his consent to be so added.

FALCONBRIDGE, J.—I concur in the judgment of my brother Street as to the law. As to the amendments which are asked, whilst not dissenting, I am not sure but that we impose harsh terms when the plaintiff is ordered

to pay all the costs of the action. In *Attorney-General v. Birmingham*, 15 Ch. D. 423, the persons against whom it was sought by amendment to enforce a final judgment, had acquired their title after that judgment was made. The leaning of the Courts is, and should be, within reasonable limits, and on such terms as to discourage carelessness in the bringing of actions and in pleading, to allow amendments.

It would have been, to my mind, sufficient penalty to make the plaintiff pay the costs of the trial and of the motion in term.

ARMOUR, C. J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HICKS V. WILLIAMS.

Limitation of actions—R. S. O. ch. 108, secs. 5, 44—Coverture—Possession—Tenancy by the curtesy.

In an action for the recovery of land it appeared that the land was granted by the Crown in 1838 to plaintiffs' mother, who was then a married woman, and who had by her husband issue born alive and capable of inheriting the estate. The patentee died in 1856; her husband lived till 1883. Neither of them, nor any of their heirs-at-law, were ever in possession. Defendant claimed by possession, which began in 1853, and had continued thenceforward without interruption. *Held*, following *Doe Corbyn v. Bramston*, 3 Ad. & El. 63, that the patentee having been dispossessed within the terms of the Statute, R. S. O. ch. 108, sec. 5, in 1853, more than twenty years before this suit was commenced, the action was barred by sec. 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of plaintiffs' father.

THIS was an appeal from the following judgment of Rose, J., delivered after the trial of the action at London on September 16, 1887:

ROSE, J.—This action was brought to recover possession of land in possession of defendants.

The plaintiffs claim as heirs-at-law of their mother, Mary Hicks, who acquired the land by patent from the Crown, dated 19th September, 1838, as the daughter of an U. E. Loyalist. She was then married to Daniel Hicks. Children were born, who are now the plaintiffs.

Mary Hicks died on the 9th April, 1856. The husband died on the 10th October, 1883.

The possession which the defendant set up began in 1853, and continued up to date. This action was begun on the 28th of March, 1887. Evidence was adduced to shew that in 1852 or 1853, one Anthony B. Hawke purchased the land. His private ledger was produced shewing an account opened with the lot, and if the entries may be looked at for any purpose, it is clear he did then purchase the whole lot, but from whom it is not stated.

The same page has entries shewing a sale of the east half of the lot to one Owen Doyle, and receipt of purchase moneys, and a memorial of a deed from Hawke to Doyle was produced, dated the 3rd August, 1859.

Mr. Winlow testified that his partner Johnson, as agent of Hawke, sold the east half to one Doyle, in 1852.

I have no doubt that possession was taken by Doyle under an agreement of purchase of the east half, and so find; and further find that the possession was of the east half, and that the defendant must not be confined to a pedal possession as in the case of a trespasser.

Daniel Hicks, three or four years before his death, threw into the fire the patent deed with other papers, saying that he never would do any thing with it.

This circumstance, taken with the dealings by Hawke with the lot, creates a very strong presumption in my mind that Hawke did in fact purchase the lot from Mrs. Hicks, and that thereafter she and her husband took no further interest in it.

The legal evidence of title is wanting, and unless the defendant can rely upon the Statute of Limitations, the plaintiffs must succeed in recovering the land to which, in any view of the case, their claim is more technical than meritorious.

During the life time of the patentee she and her husband were seised in right of the wife: Per Richards, J., in *Wigle v. Merrick*, 8 C. P., p. 326.

The Statute of Limitations then in force was 4 Wm. 4, ch. 1, as amended. See ch. 88, C. S. U. C., p. 868.

By sec. 16, of 4 Wm. 4, it was provided that "No person shall make an entry, or distress, or bring an action to

recover any land or rent, but within twenty years next after the time at which the right to make such entry, or distress, or to bring such action, shall have first accrued to some person through whom he claims." * * *

Did the right to make entry upon the land in question, or to bring an action, accrue to Mary Hicks in her lifetime? It has been argued that she having died under coverture had no right at any time after entry by Owen Doyle to make an entry, or bring an action, and her heirs had no right after her death, or until her husband's death in 1883, and so are entitled to maintain this action.

Mr. Street relied upon sec. 45 of ch. 88, which is as follows: "If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, as hereinbefore mentioned, such person shall have been under coverture, * * then such person or the person claiming under him may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, within twenty years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (whichever shall have first happened.)"

If, therefore, Mary Hicks had such right in her lifetime it is clear that having died in 1856 the plaintiffs claiming under her were barred in 1873, as the ten years from her death would add nothing to the twenty.

By sec. 46, ch. 88, the time to bring such action is limited to forty years from the time "such right shall have first accrued," although the person thus barred was under coverture at the time the right first accrued.

It is clear, therefore, that the statute treated coverture merely as a disability, and considered that a woman under coverture had the right to make an entry or distress or bring an action during coverture.

This seems to have been taken for granted in *Wigle v. Merrick, supra*. See p. 313, where Draper, C. J., states that, "If she had survived him, and forty years from the time Arnold took possession had not elapsed, she could, after his death, have maintained an ejectment," &c., language which would be insensible if she had no right to bring an action during coverture from the accruing of which right the forty years could commence to run.

The other disabilities named in sec. 45 are, being "an infant, an idiot, lunatic, of unsound mind or absent from

Upper Canada," in all of which cases actions might be brought notwithstanding the disability; but the persons were not bound to bring action until after the disability had ceased, provided the forty years limit was not exceeded.

In the same case of *Wigle v. Merrick* Richards J., assumed, at p. 326, the right of the wife to maintain an action, for he said: "It is very probable that if the wife had brought an action joining her husband with her, that her coverture would be an answer to the statute if the twenty years possession had been set up * * *."

In *Farquharson v. Morrow*, 12 C. P. at p. 313, Draper, C. J., again assumed the right to exist during coverture, for he said: "If she and her husband had lived for twenty years after the defendant had entered into possession and then her husband had died, she would, under sec. 45, have had ten years after his death to bring an ejectment."

He adds, in language which seems to me to govern this case: "As she died while under this disability, the case falls within the 47th section, which gives no time to the plaintiff to bring this action beyond the period of twenty years next after his mother's right first accrued, or beyond the period of ten years next after his mother's death."

In that case it was claimed that as the plaintiff's father had survived his mother some two years, he had twenty years from his father's death to bring his action. The learned Chief Justice decided he had not, departing from the position taken by him in *Wigle v. Merrick*.

I do not quite apprehend the uncertainty of the language, used later in the judgment, as follows: "The heir of the wife has certainly not more than ten years from the death of the husband, if indeed the ten years must not be reckoned from the death of his mother, against whom, but for her disability, the time would have commenced to run."

As there had elapsed ten years from the death of the father, and consequently more than ten from the death of the mother, either view was fatal to the plaintiff; but I venture to think there is no doubt that the ten years must be reckoned from the mother's death.

See also *Trickey v. Seeley*, 31 U. C. R. 214. *Weaver v. Burgess*, 22 C. P. 104, was referred to, but there the possession was taken after the death of the wife.

This would dispose of the plaintiffs' claim in this case, if Mr. Meredith's contention, that the repeal of subsecs. 45 and 47 by 38 Vic. ch. 16, (O.), and the disappearance of "coverture as a disability" prevented the defendant invok-

ing their aid, is not entitled to prevail, and I think it is not.

The twenty years expired in 1873, and the Act in question came into force, at the earliest, on the 1st of July, 1876.

By sec. 16 of ch. 88, the plaintiffs' right was extinguished at the determination of the period limited for bringing the action, and so was extinguished in 1873, if I am correct in my view of the law.

The Act of 1874 was not passed to create a new right or extend the time, but to lessen it. See the preamble. (Sec. 42 of the Interpretation Act puts the question, as it seems to me, beyond doubt.)

I am inclined to think that even if it be held that the statute did not commence to run in the lifetime of the mother, the defence may safely be rested upon another ground, viz: that more than five years, expired prior to this action since the tenancy by the curtesy was extinguished by the statute. See sec. 3 of 38 Vic. ch. 16 (O).

Whether the time be reckoned from 1853, when possession was taken, or from 1856, when Mary Hicks died, (see the discussion in *Wigle v. Merrick*,) more than five years elapsed between the extinguishment of the estate of the father and bringing the action.

Such estate was not transferred to the person in possession, it was extinguished. If it was transferred, then in case of a succession of trespassers to whom was it transferred? See *Kipp v. Synod of the Diocese of Toronto*, 33 U. C. R. 220, and cases there cited. See also *Darby & Bosanquet*, on the Statutes of Limitation, pp. 388, *et seq.*, and the case of *Dixon v. Gayfere*, 17 Beav. 421, there referred to. On p. 389, the learned authors say: "It has been said that the effect of the statute is to execute a conveyance to the party whose possession is a bar, and that by its own force it not only extinguishes the right of the former rightful owner, but transfers the legal fee simple to the party in possession; referring to *Scott v. Nixon*, 3 Dru. & War. 407, and *Incorporated Society v. Richards*, 1 Dru. & War. 259: "It is apprehended, however, that it may more strictly be said that its operation in giving a title is negative: it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to reject him;" referring to *Dixon v. Gayfere*, 17 Beav. 421.

As was pointed out by Richards, C. J., in *Wigle v. Merrick*, p. 328, that sec. 16 "cuts off the right as well as the remedy,"

while the statute in force when Mr. Preston wrote barred the remedy only, and not the right.

Hagarty, J., in *Wigle v. Merrick*, at p. 333 says, "I incline strongly against this alleged right of the disseisor on the law as it now stands."

Trickey v. Seely, *supra*, is apparently against this view; but in that case there was a surrender of the estate by the curtesy, and moreover it is dependent upon *Wigle v. Merrick*, 8 C. P. 307, and with the change of view, of Draper, C. J., as above pointed out in *Farquharson v. Morrow*, and the expression of opinion of Hagarty J., in *Wigle v. Merrick*, I may, I think, without presumption, express my own opinion.

I am unable to see how an estate, which was extinguished by the statute and not continued by transference to the person in possession, could be set up by him against the claim of the heir; and as the statute preserves to the person entitled to the future estate or interest five years after the determination of the particular estate within which to bring his action, he certainly cannot complain, if indeed hardship can be at all considered in construing a statute which is necessarily so arbitrary in its provisions.

"Determination," "determined," are the words made use of in secs. 2 and 3 of ch. 16. Can it be said that an estate which has been "extinguished" has not been "determined?" If it has, then the plain, literal reading of the Act leaves no room for doubt.

The plaintiffs' case was not, in argument, rested upon the fact that the lot was in a state of nature when possession was taken; possibly because it was considered that the amendment reducing the period under sec. 3 of ch. 88, from forty to twenty years, took away any legal ground for such defence.

If it had been, I should have to consider whether there is not sufficient evidence upon which to base a finding of fact that there was a sale from the patentee to Hawke, and whether if so the case would not be outside of section 3; and if I came to the conclusion that such finding would not be warranted by the evidence, I would, if the defendant desired it, permit further searches to be made in the Crown Lands Office and elsewhere, to ascertain if any letters or other writing could be found to establish the defendant's claim.

As it is I say nothing as to the law or facts upon such a question.

The plaintiffs' action must be dismissed, with costs.

6th December, 1887, *W. Kerr*, Q.C., and *Aylesworth*, for the appeal.

Becher, Q. C., contra.

February 6, 1888. ARMOUR, C. J.—The points necessary for the determination of this case are simple and are not in dispute.

The land in question was granted by the Crown on the 19th day of April, 1838, to Mary Hicks, the wife of Daniel Hicks, in fee.

Mary Hicks died on the 9th day of April, 1856, having had by her husband, Daniel Hicks, issue born alive and capable of inheriting her estate.

Daniel Hicks, her husband, survived her, and died on the 10th day of October, 1883.

The plaintiffs are the heirs-at-law of Mary Hicks, and the descendants of her marriage with Daniel Hicks.

Neither Mary Hicks, nor her husband, Daniel Hicks, nor any of their descendants, nor of the said heirs-at-law, were ever in actual possession of the land.

One Owen Doyle, under whom the defendant claims title, purchased the said land from one Anthony B. Hawke sometime in 1852, and went into actual possession of it in 1853, and obtained a conveyance thereof from said Hawke in 1859 or 1860, and he, and those claiming under him, including the defendant, have continued in the actual possession thereof ever since.

This action was commenced on the 28th day of March, 1887.

Section 44 of R. S. O. ch. 108, is in terms the same as the 17th section of the Imperial Act, 3 & 4 Will. 4th, ch. 27, and under sec. 17 of the Imperial Act *Doe Corbyn v. Bramston*, 3 Ad. & El. 63, was determined.

In that case one Whiteside was seised in fee of the land in question, and died seised in 1774, leaving no issue, but leaving his wife surviving, to whom he devised the land in

fee. In the same year, 1774, the widow married the father of the lessor of the plaintiff, who was the eldest son of this second marriage. The widow had continued in possession of the land from the death of her first husband to the time of her second marriage, and she and her second husband also continued in possession for some years after the marriage. It appeared that they afterwards removed from the land to which they never returned. The wife died in 1828 and the husband in 1832. No act of ownership or occupation of the land was proved to have been done by them after they removed from the land; the precise time of such removal was not shewn, nor whether it was within forty years of Mrs. Corbyn's death; but it was clearly more than forty years before the commencement of this action, which, was brought within five years after the death of the father of the lessor of the plaintiff, and within five years after the passing of 3 & 4 Wm. IV., ch. 27. The Judge who tried the cause nonsuited the plaintiff.

On motion to set aside the nonsuit the Court refused the rule. Lord Denman, C. J., delivering the judgment of the Court, said: "The fact being clear that within the terms of 3 & 4 Wm. IV., ch. 27, sec. 3, the plaintiff's mother was dispossessed, or discontinued the possession or receipt of the rents above forty years before the action brought, the action is clearly barred by section 17 of the same statute. Some argument was raised on the question whether the possession was adverse or not, but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date."

In this case Mary Hicks was dispossessed within the terms of R. S. O. ch. 108, sec. 5, in 1853, more than twenty years before this action was brought, and so this action is clearly barred by sec. 44 of the same Act; for this action cannot be distinguished in principle from that of *Doe Corbyn v. Bramston*.

If the husband, during the coverture, had conveyed the land in question to another, by an assurance not binding

on the wife, then the question would have arisen which arose in *Jumpsen v. Pitchers*, 13 Sim. 328. See also *Cannon v. Rimington*, 12 C. B. 1; *Doe Johnson v. Liversidge*, 11 M. & W. 517; but no such conveyance was made.

As was said by Parke, B.: "It is a strong thing to deprive a man of a right who has had no opportunity of exercising it," but the Legislature, and not the Court is responsible for having done it.

In my opinion the motion must be dismissed, with costs.

FALCONBRIDGE, J., concurred.

STREET, J., took no part in the judgment, having been concerned in the case at the bar.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

ARCHBOLD V. THE BUILDING AND LOAN ASSOCIATION.

Mortgagor and mortgagee—Redemption—Six months notice or interest after default—Interest post diem—Tender—Evidence.

T. borrowed money from the defendants and gave a mortgage over certain lands as security, with other securities as collateral, giving a second mortgage over the same lands to the plaintiff. Both mortgages being in default, the defendants agreed in writing with the plaintiff, who began foreclosure proceedings, that if he obtained a final order subject to their claim, they would accept from him a new mortgage over the same property for \$15,000, payable in five years from the date of the order, with interest at 8 per cent., and that he was "to have the privilege of paying any part of principal at any time." Upon payment as aforesaid the defendants were to assign to the plaintiff their mortgage from T. and all collaterals. The plaintiff obtained a final order and gave the defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years, with interest at 8 per cent. half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for assignment to the plaintiff of the original securities, and had a clause that "the mortgagor may at any time pay off the whole or any part of the said \$15,000, before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years the plaintiff paid interest at the specified rate, until the 1st January, 1887, and on the 22nd March following tendered the defendants the principal and interest at that rate up to that day, and demanded an assignment of the original mortgage and securities. The defendants refused to accept, claiming that they were entitled to six months notice of the mortgagor's intention to pay, or to six months' interest in advance.

Held, ARMOUR, C.J., dissenting. 1st. That the rule followed by Courts of Equity in England that a mortgagor must, after default by him in payment of the principal money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, has the force of law in Ontario.

2. That there were no circumstances in the present case to do away with its effect, the proviso for payment of the principal being limited to the five years within which the plaintiff had covenanted to pay the same.

3. That after the expiration of five years from the date of the mortgage there was no contract in force for the payment of interest, and the defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months notice.

4. That in this case the defendants were entitled to the six months notice, and the tender on 22nd March, 1887, was insufficient, and as no evidence was given by the defendants as to the rate of interest after default, and evidence offered by the plaintiff on the point was refused at the trial, the legal rate of 6 per cent. should be taken as the measure of damages.

THE defendants were a Loan Company carrying on their business in Toronto, and the plaintiff, was an accountant, also carrying on business there.

In the years 1874 and 1875 one Mary Ann Trotter made certain mortgages to the defendants of leasehold premises in Toronto, and subsequently mortgaged the same premises to the plaintiff. In the month of June, 1880, all the mortgages to both the defendants and the plaintiff were in arrear, and the plaintiff had filed a bill in Chancery to foreclose his mortgage, subject to the defendants' mortgages, upon which there were then due some \$15,000.

On the 19th June, 1880, an agreement was entered into between the plaintiff and the defendants that the plaintiff should proceed to foreclose his mortgage, and that upon his obtaining a final order in the foreclosure action, he should give the defendants a mortgage securing the payment of \$15,000, payable "*at the expiration of five years*" from its date, with interest at eight per cent. per annum, half yearly, from the first day of July, 1880, and securing also the payment of the fire insurance policies upon the property, the premiums on certain life policies held by the defendants as collateral security, and the ground rent as it should mature; that as further security the plaintiff should at once give the defendants a mortgage for \$5,000 upon certain freehold property of his in Toronto, and a chattel mortgage upon certain furniture. In consideration of his doing so the defendants agreed to assign their mortgages and all "securities they hold collateral thereto, to Mr. Archbold, including the two life policies, *when he shall have paid off the \$15,000 and interest,*" and by the eighth paragraph of the agreement it was provided as follows: "*Mr. Archbold to have privilege of paying any part of principal at any time.*"

The mortgage for the \$5,000 was duly given, and the plaintiff, having obtained his final order of foreclosure, on the 8th January, 1881, gave to the defendants a mortgage upon the leasehold premises to secure payment of \$15,000, with interest thereon from the 1st July, 1880, at 8 per

cent. per annum, as follows: "The said principal sum to become due and payable *at the expiration of five years from the date hereof*, together with interest thereon at the rate aforesaid, payable half yearly, on the second days of January and July, in each and every year, *until fully paid off and satisfied*;" and also the payment of the premiums upon the life policies before mentioned.

It was specially agreed by the mortgage as follows: "That the mortgagees shall, until payment of said \$15,000, and the moneys payable under these presents, retain the mortgagees' life policies, and other securities they at present have for securing the amounts to them due and payable or to become due and payable, for advances made to Mary Ann Trotter; and that upon payment of the said \$15,000, and all moneys secured by these presents, the said mortgagees shall convey, assign and transfer to said mortgagor, his executors, administrators, or assigns, all such mortgages, life policies and other securities, as aforesaid, to have and, to hold for his own use and benefit: Provided, further, and it is hereby agreed by and between the parties hereto, that the mortgagor may at any time pay off the whole or any part of the said sum of \$15,000 before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal; and interest shall thenceforth cease to grow due upon the sum so paid."

The defendants, upon the completion of this mortgage, made an entry in their books under Mrs. Trotter's account as follows:

"P. C. Archbold takes possession of this property under final order of foreclosure, subject to our mortgage, which he assumes, and gives as collateral a second mortgage on his two houses on Church street, for \$5,000, &c. Principal re-payable on 1st July, 1885; interest half-yearly on 1st July and 1st January; first on 1st January, 1881, with privilege of paying off all or any part of the principal at any time."

The interest was from time to time paid on the \$15,000 during the five years, but no part of the principal was paid either before or at the maturity of the loan. After the principal had become due the plaintiff continued to pay the interest at the same rate of eight per cent without any new agreement of any sort until the end of the year 1886, when the defendants wrote the plaintiff asking for payment of \$259.25 for balance of interest to 1st July, 1886. In reply Mr. Foy, the plaintiff's solicitor, wrote to the manager of the defendants company, referring to this letter, and went on to say, "How do you make up this amount? The eight per cent formerly paid when the rate of money was high has, of course, ceased since the maturity of the mortgage. Perhaps you have been by mistake computing at the former rate. Mr. Archbold had, by terms of the mortgage, I understand, the privilege of paying off at any time. He now wishes to pay off. Be good enough to make a computation again of the amount, and let me have same to shew Mr. Archbold." In reply to this the solicitors for the defendants wrote Mr. Foy: "Re Archbold. We enclose statement asked for in yours of ——— to Building and Loan Association. There is no privilege allowing repayment, and the interest remains at the rate always heretofore paid by Mr. Archbold."

In February, 1887, the interest being again in arrear proceedings appeared to have been begun to recover it, and a further correspondence took place between the solicitors for the parties, the plaintiff's solicitor insisting that under the terms of the mortgage he was entitled to pay off the principal at any time without notice, the defendants' solicitors insisting upon their right to six months notice, or six months interest. Finally, on 22nd March, 1887, the plaintiff's solicitor tendered to the defendants \$15,000, with interest to that date, which was refused, the position of the defendants being set forth in a letter from their solicitors to the plaintiff's solicitors refusing the tender, as follows: "The Association maintains that they are entitled to have six months notice of mortgagor's intention to pay

off, or six months interest in advance before the mortgagor can claim that right. We admit the tender, less some six months interest."

Without prejudice to this tender, on 23rd March, 1887, the plaintiff's solicitor gave notice that the plaintiff would "on 24th September, 1887, pay to the defendants the amount legally and lawfully due and owing on the \$15,000 mortgage on the Front street premises."

On 12th April, 1887, the plaintiff began this action, and in his statement of claim submitted that the claim of the defendants to a right to six months' notice of intention to pay off the mortgage in question was unlawful and unauthorized, and further that if any such rule existed in general cases (which the plaintiff denied) it was not applicable under the terms of the mortgage in question, and the circumstances of this case; and he claimed a declaration that the defendants were not entitled to six months' notice, or six months' interest as contended by them, and a declaration that the plaintiff on 22nd March, 1887, duly tendered the full amount of principal and interest due and owing to the defendants, and that the plaintiff was upon payment of the amount so tendered entitled to an assignment of the securities mentioned in the agreement between the parties, and a declaration of the rights of the plaintiff, and the obligations of the defendants in respect of the mortgages in question.

The defendants, by their statement of defence, stated that the plaintiff's mortgage was in default after the expiration of five years from its date, and that in consequence of such default they were entitled to six months notice of the plaintiff's intention to pay the principal, and to payment of the principal and of the interest accrued to the time of such payment before the plaintiff could lawfully demand discharge of his mortgage, or assignments of any other securities.

The action was tried before Galt, C.J., at the Toronto Fall Assizes, 1887.

The manager of the defendant company was examined as a witness, and stated that the plaintiff had paid the half yearly payments of interest since the debt became due, at 8 per cent., to the 1st January, 1887, and that beyond the payments and acceptances of interest there was no agreement, written or verbal, between the plaintiff and the defendants as to the continuation of the mortgage. The plaintiff was also sworn, and stated that he thought the mortgage was due in the year 1887, and was not aware that he had been making payments of interest upon the mortgage after it was due.

The learned Chief Justice upon these facts directed that on payment of the sum of \$15,000, and interest at 8 per cent. thereon up to the 22nd March, 1887, the defendants should discharge the mortgage on the Church street property, and assign and deliver up all the collateral securities held by them in respect of the said loan, and pay the costs of the action, but stayed judgment until the fifth day of Michaelmas Term.

December 9, 1887. *Beaty*, Q.C., and *A. Cassels*, moved to set aside the judgment of the learned Chief Justice, and *S. H. Blake*, Q.C., shewed cause.

The arguments and cases cited are referred to in the judgment.

February 6, 1888. STREET, J.—The questions raised by the pleadings and evidence are shortly these; first, whether there is any rule or law in force in this Province entitling a mortgagee to six months, or any lesser number of months notice, before he can be called upon to receive payment of principal money overdue and payable to him upon a mortgage security; secondly, whether, supposing such a rule to be in force, the terms of the mortgage, or the circumstances, in this case, take it out of the rule; and thirdly, supposing the rule to cover this case, are the mortgagees entitled to interest for the six months in question, at 8 per cent., or at what lesser rate.

With regard to the first of these questions the authorities and text writers, to whom we were referred during the argument, without exception support the view that a custom or rule of Courts of Equity has prevailed, certainly for more than a hundred years, which is stated in *Coote on Mortgages*, 5th ed. at p. 1174 as follows: "It has become a settled rule that a mortgagor must, after default made by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, in which latter case no notice is requisite."

In *Powell on Mortgages*, 6th ed. published in 1826, the reason is thus stated in a note, at p. 934, quoted from 2 Cases and Opinions, p. 51, referring to the position of mortgagor and mortgagee after default: "So that, whenever the mortgagee calls for his money, the mortgagor must pay it; but the mortgagor is not in the same situation. He cannot compel the mortgagee to take his money at a moment's warning: he must give the mortgagee six months to recover it, or, which is the same thing, pay him six months' interest in advance, because the day of redemption at law being passed he has lost his estate at law and can be let in to redeem by a Court of Equity only; and a Court of Equity will not assist unless he do equity; and the Court holds that it is equitable that the mortgagor give six months' notice of paying in the money, to enable the mortgagee to provide another place for it; so that it is incumbent on a mortgagor to give notice."

The rule seems to have been imported from England into this Province as one of the equitable principles under which Courts of Equity here should deal with the respective rights of mortgagors and mortgagees after default. This was expressly held by Vice Chancellor Blake in an unreported case of *Latshaw v. Davis*, on 7th June, 1877, upon the authority of decisions, also unreported, of Vice-Chancellor Esten and Vice Chancellor Mowat, to which he refers in his judgment. The existence of the rule is referred

to in several late cases in this Province : see *Trust and Loan Co. v. Kirk*, 8 P.R. 203 ; *Re Houston, Houston v. Houston*, 2 O. R. 84 ; and I have been unable to find any case in which it is questioned. I am not concerned as to whether or not a shorter notice than six months would, under the circumstances in this Province, have been sufficient in most cases to do justice to the mortgagee : that period was fixed by the Court of Chancery in England more than a century ago, and has been adopted by the Court of Chancery here as the proper period, and I think it must be treated as being a part of the law of the land.

It is true, as was pointed out by the counsel for the plaintiff, that the Dominion Legislature, by the Act 43 Vic. ch. 42, sec. 5, has provided that where a mortgage has been made under which the principal is not repayable for more than five years from its date, the mortgagor shall have the right at any time after five years from the date of the mortgage to pay off the principal and accrued interest, *together with three months further interest in lieu of notice* ; but this is an exceptional piece of legislation dealing with a particular class of cases, and while it recognizes that the mortgagee is entitled to some notice, it amounts at most to a hint, from a legislative body, which it appears to me could not deal directly with the subject, as to the length of notice deemed by it to be sufficient in order to do justice to the mortgagee.

The cases in which the mortgagee has not been allowed to claim the six months' notice, or six months' interest in lieu of it, will all be found to turn upon special circumstances, either amounting to a demand of payment by the mortgagee, or to a consent of some sort on his part to receive his money without any notice, or interest in lieu of notice : see *Day v. Day*, 31 Beav. 270 ; *Letts v. Hutchins*, L. R. 13 Eq. 176 ; *Banner v. Berridge*, 18 Ch. D. 254 ; *Re Alcock*, 23 Ch. D. 372 ; *Re Moss*, 31 Ch. D. 90 ; *Re Houston*, 2 O. R. 84 ; *Trust and Loan Co. v. Kirk*, 8 P. R. 203. In all these cases the rule as to six months' notice is not questioned, but its application is prevented or contested under the special facts of each case.

Are there, then, in the present case any special circumstances which prevent the application of the rule?

I do not think that the fact of the plaintiff's mortgage having been given as it was in settlement of a pre-existing debt, can make any difference. The money was money which the defendants had lent to Mrs. Trotter; if she had paid it after its maturity, they would have been entitled to notice, and I can see no reason at all, apart from the form of the mortgage given by the plaintiff, why they should not be entitled to notice from him, when the mortgage which he gave to pay Mrs. Trotter's debt also went into arrear.

So far as the form of the mortgage is concerned, it is beyond any question that it gave to the plaintiff the right to pay off the principal sum at any time he chose within the period of five years from its date, without any notice whatever. I think that the mortgage correctly interpreted the agreement which preceded it, in limiting to the period of five years from the date of the mortgage the right of mortgagor to pay off the mortgage money, and that that was the true intent and meaning of the agreement. The entry on the defendants' mortgage book, stating that the mortgagor's privilege was to pay the whole or any part of the principal at any time, was made by a clerk, and taken by him no doubt from the mortgage: it was not, so far as appears, intended to enlarge the right of the mortgagor, but as a note for the information of the defendants' officers that the mortgagor was not compelled to leave the whole principal money unpaid for the full period of five years, but might repay it sooner if he desired to do so.

The five years limited by the plaintiff's mortgage for the payment of the \$15,000 expired on the 8th January, 1886, and his position on the following day was, in my opinion, this; that he was liable to be called on at any moment to pay the mortgage money, but that, unless called upon to pay it, he could not compel the mortgagees to take his money without giving them six months' notice or paying them six months' interest in lieu of such notice;

and if this was his position and that of the mortgagees on that day it must be taken to have continued to be their position until their rights were altered by some agreement between them. I can find no evidence whatever of any agreement between them either express or implied which alters these rights. The plaintiff continued to pay his interest as before, supposing, as he says, that the mortgage money was not yet due; the defendants were in receipt of a high rate of interest, and were not anxious to call in their principal. It was argued by counsel for the plaintiff that the fact of the receipt by the defendant of the half yearly payments of interest after the maturity of the principal is evidence of a new contract on their part with the plaintiff; and that the provisions of the mortgage, including that giving him a right to pay off the principal at any time, must be taken to be part of the new contract—something after the manner in which provisions in an expired lease are sometimes taken to form part of the terms of a yearly tenancy which succeeds it, the same tenant continuing to hold. I have found myself unable to come to the conclusion that the cases are parallel. Where a tenant for a term holds over after its expiration, and then pays rent, a long established rule converts into a yearly tenancy the precarious tenure under which he has held possession since the expiration of his term, and a Court or jury is then entitled to find, upon the evidence before it, what provisions, if any, of the former holding have been expressly or impliedly added to the ordinary terms of a yearly tenancy: *Oakley v. Monck*, L. R. 1 Ex. 159; *Hyatt v. Griffiths*, 17 Q. B. 505. But where a mortgagor makes default in payment of the principal at the appointed time, and afterwards, whether at the usual times at which he has been accustomed to pay his interest or not, pays sums of money which are accepted by the mortgagee by way of interest, I cannot, in the absence of any thing further, discover evidence of any new contract, either suspending for a single day, beyond that to which the interest is paid, the right

of the mortgagee to call for payment of his principal, or waiving the other right which accrued to him on the mortgagor's default, of requiring notice, or interest in lieu of it before the mortgagor could redeem. The privilege of repayment ceased by its own terms at a certain date: we are asked to say that it is to have force up to a date more than two years later. We must not make a new agreement for the parties, and there is no evidence that they have made one for themselves; therefore, I think that the plaintiff is wrong in his contention that he was entitled, on the 22nd March, 1887, without any previous notice, to require the defendants to accept their principal, with interest calculated only to that date.

The remaining question is, as to the basis upon which the amount to be paid by the plaintiff to the defendant is to be calculated, whether as interest or as damages, and at what rate. The words of the proviso for repayment in the mortgage in question here have already been quoted: they provide in effect that the principal is to be paid in five years from the date of the mortgage, and that the interest is to be paid half-yearly until the principal is "*fully paid off and satisfied*." If these words are to be construed as a covenant by the mortgagor to pay the rate of interest specified in the mortgage after default as well as before default in payment of the principal, then all difficulty is at an end. But the weight of authority is clearly against such a construction: in *St. John v. Rykert*, 10 S. C. R. 278, the words were, "until paid," and they were held not to apply after default made in payment of principal: in *Re European Central R. W. Co.*, 4 Ch. D. 33, as explained in *Popple v. Sylvester*, 22 Ch. D. 98, the words, "until repayment thereof," received a similar construction, and were held to mean, "until the day fixed for repayment thereof;" and in *Powell v. Peck*, 12 O. R. 492, the words, "until payment in full," were held to be of no greater force than the words, "until paid," in *St. John v. Rykert*.

In *Popple v. Sylvester* the words were, "so long as the sum of £3000, or any part thereof, should remain due on the security of the said indenture" and were held to be capable of the construction that interest was to be paid after, as well as before, default in payment of principal at the day fixed in the indenture; but I cannot properly distinguish the words in the plaintiff's mortgage here as being substantially different in their meaning from those used in the instrument considered in *St. John v. Rykert*, and must therefore hold that their force was at an end when the period fixed for payment of the principal had expired, and that after that date no contract existed for the payment of interest subsequently accruing.

Whatever is to be allowed to the defendants as compensation for the non-payment of their principal at the day fixed for payment, beyond what has been already paid them, must be allowed by way of damages, and the measure of damages should be the ordinary value of money while it was withheld, and during the period of the currency of the six months' notice to which the mortgagees are entitled.

Evidence was tendered at the trial as to what had been the ordinary rate of interest here during that period, but was rejected, the learned Chief Justice being of opinion that the rate of damages should be fixed at the legal rate of six per cent. The matter does not seem, however, to be free from doubt.

In *Cook v. Fowler*, L. R. 7 H. L. at p. 37, Lord Selborne says: "The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to."

In this Province the rate of interest upon good mortgage securities has, during the past two or three years, varied only between $5\frac{1}{2}$ and 7 per cent. per annum. The rate at

which damages in cases similar to this have been calculated has varied. Thus, in *McDonald v. Elliott*, 12 O. R. 98, in an action on the covenant, seven per cent. was allowed ; while in *Powell v. Peck*, 12 O. R. 492, which was a foreclosure suit, the mortgagee was restricted to six per cent., although in each case the security bore a higher rate upon its face.

In *Muttlebury v. Stevens*, 13 O. R. 29, where a mortgagor came in to redeem, he was directed to pay at the rate of seven per cent., that being the rate which he had agreed to pay ; but in that case there was the special circumstance that the time fixed for payment of the principal had not yet arrived ; so that the mortgagor had in fact agreed to pay at the rate of seven per cent. during the whole period for which he was directed to pay at that rate.

Had the matter been free from authority, I think that, in order to obtain a uniform rule, it would have been well to take as the measure of damages in all cases the rate of six per cent. fixed by law as payable, wherever interest is not recoverable by express contract ; because what is recovered, although technically recovered as damages, is really to all intents and purposes paid as interest.

Here, the rate originally fixed was eight per cent., but we have the evidence of the defendants' manager that money became cheaper about two years ago, and that it became difficult to get money out at that rate. The defendants offered no evidence to shew what the rate of interest really was two years ago, or in March last. On the other hand the plaintiff was stopped from giving evidence upon the point. The result is, that the rate mentioned in the mortgage ceases to be a basis, and we have no basis to fall back upon excepting the statutory one of six per cent., which I think we should adopt.

I am of opinion, upon the whole case, that the judgment of the learned Chief Justice should be set aside, and that there should be the usual redemption decree, with a declaration that the plaintiff's tender on the 22nd March, 1887,

was an insufficient one; and a further declaration that since the last date, to which the plaintiff had paid interest, the defendants are entitled to recover at the rate of six per cent. only, and that the defendants are entitled to add their costs of this suit, and of the motion and reference to their security.

ARMOUR, C. J.—The rule that after default in the payment of the principal money secured by a mortgage the mortgagee is not bound to receive it unless after six months' notice, or upon payment of six months' interest, is, no doubt, of great antiquity, but that is its only merit. It is an unjust rule, for it does not bind both parties alike. It permits the mortgagee to call for payment at any time without any notice, and it compels the mortgagor to give six months' notice, or be mulcted in six months' interest, before he can compel the mortgagee to receive. It puts another instrument in the hands of the extortioner with which to vex his unfortunate debtor, and in my experience it is never invoked except by those who do not aim to be of good repute. It will, however, like every other mode of oppression have its defenders, and will be chiefly and most stoutly defended by those who use the maxim: "Thou shalt love thy neighbour as thyself" only for the purposes of devotion. It was formulated at a time when redemption was regarded only in the light of an indulgence to the mortgagor, and before it had come to be looked upon as a right. It was adopted and has continued to exist in England under circumstances and modes of dealing wholly different from those which prevail in this Province, and it is wholly unsuited to the circumstances and modes of dealing in this Province, ought never to have been introduced here, and ought not now to be followed or recognized.

The absence of such a rule can work no wrong to the mortgagee, for upon default he can insist on payment, or for a new agreement for payment from his mortgagor.

It is not necessary, however, in the view that I take to further discuss this rule, for I think it is not applicable to the case in judgment.

In this case, after default, the mortgagees took no steps to enforce payment of the mortgage money, and the mortgagor went on paying, and the mortgagees went on receiving payment of the interest half-yearly at the rate, and according to the terms prescribed by the mortgage. The presumption arising from this course of conduct, in the absence, as here, of anything to rebut it, is that the loan was being continued upon the same terms as were contained in the mortgage. One of those terms was, that the mortgagor should have the privilege of paying off the principal at any time within the five years during which the loan was, by the terms of the mortgage, to continue, and the loan having been continued after the five years, this privilege was continued also.

The result of my view is, that the mortgagor was bound to pay interest at the rate of eight per cent. per annum, and was entitled to pay off the principal at any time.

FALCONBRIDGE, J.—At the conclusion of the argument I had formed a rather strong view in favour of the plaintiff's contentions; but a consideration of the authorities and cases cited has led me reluctantly to a different conclusion.

On the main question involved here, the rule or custom, practically declared by Blake, V. C., in *Latshaw v. Davis*, to have the force of law, acquiesced in and acted on, as it has been for years, before and since that decision, cannot be lightly ignored or set aside.

I concur in all points with the judgment of my brother Street; but considering the circumstances of the case, I shall not be sorry hereafter to find that I am wrong in my opinion.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

LEWIS V. GODSON.

Landlord and tenant—Waste—Stones gathered by tenant—Property in.

A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them.

Saunders v. Breakie, 5 O. R. 603, commented on.

TRESPASS to land, tried before Galt, J., at the Spring Assizes, 1887, in Toronto, without a jury, when the learned Judge dismissed the action, with costs.

The facts appear in the judgment.

December 7, 1887. *McCullough* moved to set aside the judgment for the defendant, and to enter the same for the plaintiff, on the law, evidence, and weight of evidence.

T. P. Galt, shewed cause.

February 6, 1888. ARMOUR, C.J.—The plaintiff, George Lewis, was the tenant of one Baldwin of certain land containing two acres and thirty-two perches, part of lot 23, in the second concession from the bay, in the county of York, and on the west side of the Davenport Road, under this instrument,—“This first day of December, one thousand eight hundred and sixty-three, certifies that the aforesaid property I have leased to George Lewis, for twenty-one years, at the yearly rent of \$3 per acre, from the year 1863.”

This land was, when leased, in a state of nature, and there was a quantity of stone upon it, and the plaintiff, George Lewis, took it for the purpose of cultivating it, and used it as a market garden, and for the purpose of cultivating it he cleared it and picked up the stones, which were the subject of this controversy, and piled them in a heap upon the demised premises.

Subsequently his co-plaintiff, George Edward Lewis, acquired an interest in the stones from George Lewis, and

subsequently, in the month of January, 1884, and during the currency of the lease, the landlord sold these stones to the defendant, who entered upon the demised premises and removed some of the stones, and for this trespass this action was brought, the plaintiffs claiming these stones as their property.

The plaintiffs are, in my opinion, entitled to succeed, for even assuming that the stones had not become their absolute property, they were, nevertheless, entitled to the possession of them during the currency of the lease, and the landlord, and those claiming under him, had no right to enter upon the demised premises, and deprive the plaintiffs of the possession of them during the currency of the lease. But I am of opinion that these stones became the absolute property of the plaintiff George Lewis, and that he had the right to grant an interest in them to George Edward Lewis, and that they are entitled to maintain this action for the value of them, as being their absolute property. The plaintiff, George Lewis, could not have enjoyed these premises, for which he was paying rent, without preparing them for cultivation by clearing them and removing the stones from them; and having the right to clear them, and to remove the stones from them, he had, as incident to that right, the right to do as he pleased with the timber cleared off, and the stones removed therefrom. This may seem somewhat in conflict with what was said by my learned brother Ferguson, J., in *Saunders v. Breakie*, 5 O. R. 603. He there said: "I can find no authority shewing that a tenant for life may cut and sell timber off the land. It seems a strange conclusion that he may cut and fell for the purpose of clearing that land, and necessarily destroy some of the timber, and yet that he may not sell what he can destroy; yet so far as I can at present see such is the state of the law."

I think that my learned brother's statement of the law is somewhat erroneous, and according to the facts of that case was not altogether necessary for the determination of that case. In my opinion if the tenant had the right to cut

and fell the timber for the purpose of clearing the land he had the right to sell, or otherwise dispose of the timber when so cut and felled.

“No sale is waste if the first act is not waste. If lessee fell and cut timber trees and sells them it is waste, *Non quia vendebat sed quia scindebat*” : *Viner's Abridgment*, Waste, H. 4.

In *Kidd v. Dennison*, 6 Barb. 11, Paige, J., said : “The farm in question was undoubtedly leased for agricultural purposes : the lessee had no other way of enjoying the premises except by clearing and preparing them for cultivation ; this could not be done without felling the timber. If he cut down the timber for the purpose of preparing the land for cultivation the severance of the trees from the freehold was not unlawful, and a sale of them, after severance, was a right incident to that of clearing the land for the purpose of agricultural improvement.”

In *Dearden v. Evans*, 5 M. & W. 11, Abinger, C. B., said : “If it were necessary to decide whether a copyholder might remove stones recently brought upon the land, or even larger stones which were encumbering the land, for the advantage of the copyhold estate, I probably should not be disposed to negative the proposition that he has such right. Probably even a tenant for years might do this, because he could not otherwise profitably enjoy the farm.”

Parke, B., said : “It is not disputed that he might remove them for the improvement of the close for the purpose of agriculture.”

I refer also to *Herlakenden's Case*, 4 Coke 62 a ; *Coke upon Littleton*, 53 a ; *The Countess of Cumberland's Case*, Moore 812 ; *Channon v. Patch*, 5 B. & C. 897 ; *Bewick v. Whitfield*, 3 P. W. 268 ; *Honywood v. Honnywood*, L. R. 18 Eq. 306 ; *Drake v. Wigle*, 24 C. P. 405 ; and *Campbell v. Shields*, 44 U. C. R. 449.

In my opinion the motion must be absolute to enter judgment for the plaintiff, with full costs of suit, for the value of the stones removed, to be ascertained, if the parties differ about it, by a reference.

FALCONBRIDGE, J., concurred.

STREET, J.—The question as to the ownership of the stones in question must depend, I think, upon the other question, as to whether the tenant was guilty of waste in collecting them.

The premises were useless except for agricultural purposes, and they could not properly be used for those purposes without the removal, from the land intended for cultivation, of the stones which are the subject of this action.

The case is, therefore, closely analogous to those cases in this Province and in the United States, in which it has been repeatedly held that whether the cutting of any kind of tree in any particular case is waste depends upon the question whether the act is such as a prudent farmer would do upon his own land, having regard to the land as an inheritance, and whether the doing it would diminish the value of the land as an estate: *Drake v. Wigle*, 24 C. P. 405; *Campbell v. Shields*, 44 U. C. R. 449; *Saunders v. Breakie*, 5 O. R. 603; *Washburn on Real Property*, pp. 108, 109.

I think the reasons upon which it has been held that the cutting down of timber by a tenant in this country for the purpose of clearing the land and bringing it under cultivation is not waste, apply with equal force to the removal by a tenant of stones which prevent his making full use of the land, which they encumber, for agricultural purposes, and that in removing the stones the tenant was therefore not guilty of waste.

The tenant is entitled to trees which are severed during his tenancy without waste, and even in England to trees blown down by the wind, provided such trees are not timber trees. See Com. Dig. *Biens*, where the distinction is thus stated: "Lessee for life or years has only a *special* interest and property in the fruit and shade of *timber* trees so long as they are annexed to land, and he has a *general* property in hedges, bushes, trees, &c., which are *not timber*; and therefore if the lessee cuts down hedges,

or trees not timber, the lessee shall have them : so if dotards, &c., which have no timber in them, are thrown down by the wind the lessee shall have them."

This distinction was approved and acted upon by Tindal, C. J , in *Berriman v. Peacock*, 9 Bing. 384.

The American cases follow the same principle, that wood cut by a tenant in clearing the land belongs to him, and he may sell it, though it is waste if he cut the wood for the purposes of sale : *Crockett v. Crockett*, 2 Ohio State Rep. 180 ; *Chase v. Hazleton*, 7 N. H. 171.

The tenant, then, being entitled to the property in trees which he had cut without waste, and to dispose of them to his own benefit, I can see no reason why he should not equally be entitled to the ownership of the stones which he has removed from the land under circumstances which do not render him liable for waste.

I think that judgment should be entered for the plaintiff for the value of the stones, and with full costs, and that if necessary, there should be a reference to ascertain the amount.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HEYDEN V. CASTLE.

Lease—Covenant by lessee to pay taxes—Construction of—Purchase at tax sale by lessee during tenancy.

K. and others, on 1st October, 1880, leased to C. and another, two parcels of land for four years, the lessees covenanting to pay all taxes, rates, &c., "which now are, or which during the continuance of the term hereby demised, shall at any time be rated," &c. In March, 1881, the lessors mortgaged one of said parcels to H. In December, 1883, part of the mortgaged land was sold to C. for the arrears of taxes to 31st December, 1882, and a conveyance was subsequently made to him by the warden and treasurer. It appeared that the land was sold for the taxes due for the years 1880 and 1882, with interest and costs.

In an action brought by the mortgagee H. to set aside the tax deed as a cloud on the title, or to have the tax purchaser declared a trustee for him.

Held, that the tax purchaser could not hold the title so acquired against his lessors and the plaintiff, the lessees being bound under their covenant to pay the taxes for which the land was sold.

McNaughton v. Wigg, 35 U. C. R. 111, distinguished.

THE statement of claim alleged that one Knott and others on 1st October, 1880, leased to defendant Castle and one Wilkinson, lots 26 and 27, in the 3rd concession Muskoka, for four years, the lessees covenanting with the lessors, their executors, &c., "that they the said Henry Castle and John Wilkinson, shall and will from time to time, and at all times during the said term, well and truly pay or cause to be paid all taxes, levies, duties, charges, assessments and impositions whatsoever, whether parliamentary, municipal, or otherwise, which now are, or which, during the continuance of the said term hereby demised, shall at any time be rated, charged, assessed, or imposed on said premises, or any part thereof:" that on 17th March, 1881, said lessors mortgaged the premises to plaintiff, and default had been made in payment of the moneys secured thereby: that on 5th December, 1883, said lot 26 was offered for sale for taxes alleged to be due for 1880, and eighty acres thereof were sold to one Taylor, an agent of defendant, for \$20.76, and a conveyance subsequently made to the defendant and registered.

Plaintiff claimed to have the deed to defendant set aside and removed from the Registry Office, as a cloud on the title, or to have the defendant declared a trustee of the land for the plaintiff.

The statement of defence denied the allegations of the plaintiff.

Issue.

The case was tried before O'Connor, J., without a jury, at the last Barrie Spring Assizes, when the learned Judge dismissed the action, with costs.

December 9, 1887, *Strathy*, Q. C., moved to set aside the judgment and enter it for the plaintiff.

Pepler, shewed cause.

The facts appear in the judgments.

February 6, 1888. ARMOUR C. J.—Thomas N. Knott, Maria Farr, and Maria Knott, by indenture, dated 1st October, 1880, demised lots twenty-six and twenty-seven, in the third concession of the township of Muskoka, to the defendant and to one John Wilkinson, to hold for four years from the 1st October, 1880, for the yearly rent of twenty-five dollars, and by the said indenture the defendant and the said Wilkinson covenanted with the lessors that they should and would from time to time, and at all times during the said term, well and truly pay, or cause to be paid, all taxes, rates, levies, duties, charges, assessments and impositions whatsoever, whether parliamentary, municipal, or otherwise, "which now are, or which during the continuance of the said term hereby demised shall at any time be rated, charged, assessed, or imposed on said premises, or any part thereof;" and the said lessors covenanted with the said lessees that if they the said lessees should do, perform, and keep the covenants on their part to be performed, they should have the right to purchase said lots at or for the price or sum of eight hundred dollars at the expiration of said term.

Subsequently, and on the 17th March, 1881, the said

lessors, by indenture of that date, conveyed the said lot, number twenty-six, to the plaintiff in fee, for securing the sum of two hundred dollars and interest.

On December 5, 1883, under a warrant, under the hand and seal of the warden of the county of Simcoe, the treasurer of the county of Simcoe sold to the defendant the west eighty acres of said lot number twenty-six, and the east 70 acres of said lot 27, in the said third concession of the said township, for the price or sum of \$20.76, on account of the arrears of taxes alleged to be due thereon, up to December 31, 1882, together with costs, and on December 26, 1884, the said warden and treasurer executed to the defendant a deed of the same.

The bargain for the lease was made by the lessees with the lessor Thomas N. Knott, and was that the lessees were to pay \$25 a year and taxes. Nothing was said about the taxes for the year 1880, in October of which year the term commenced.

Some time after the lease was made, it did not appear when, the tax collector called upon the lessees for the taxes of 1880, and they refused to pay them, and went to see the lessor, Thomas N. Knott, and informed him of the demand that had been made upon them.

The defendant gave this account of this interview: "I told him the tax collector had been to me for taxes due on the property that I had, and that I never expected to pay, and would not pay it." He says, "You must pay it," and I says, "No." "He says he was going away and had no money, and would I pay, and I said no, I would not do it," and he said, "Very well then I must pay it." Q. Did he claim that you were to pay those taxes as a right? A. He claimed that. Q. Did he ever dispute what you said, that you were not to pay the taxes? A. No. Q. And finally you left him and he said he would pay them? A. He did. And the lessee Wilkinson gave this account of it: "Castle asked him how it was that the tax collector had been around to see us about the taxes on the two lots, and Knott said that we

had to pay them. Mr. Castle said he would not think of such a thing, that we had not to pay them for that year, because we were not on the property till after the taxes were due. Well, we had some argument over the thing, and finally Knott saw that we were determined not to pay the taxes, and he said that he supposed if we would not pay them that he would have to: that was all that I think passed."

The lots were in a state of nature at the time the lease was made, and the lessees never occupied them, but cut a little wood on them, and they never paid any taxes on them, nor were any taxes ever demanded of them except the taxes of 1880, and the lots were not assessed to them, but were assessed as non-resident. The defendant paid taxes on them after he bought them at the tax sale. The defendant said that he thought the amount the tax collector demanded for the taxes of 1880 was about five or six dollars.

The case made by the pleadings was, that the land in question was sold for the taxes of 1880, and that the defendant and his co-lessee were bound to pay these taxes, and that therefore the defendant could not purchase the land in question and hold it against the plaintiff.

It was obvious, however, from the evidence, that the lots were sold for taxes accrued since those for the year 1880, for, according to the recital in the deed, they were sold for taxes alleged to be due thereon up to the 31st day of December, 1882, and the evidence shewed that the lessees paid no taxes on them at all prior to the sale, and the amount demanded as the taxes for 1880 was five or six dollars, and the amount for which they were sold was \$20.76.

We allowed, however, a certificate from the treasurer of the county of Simcoe to be put in, which shewed that the land in question was sold for arrears of taxes which accrued due for the following years:

For the year 1880, the sum of	\$2 65
“ “ “ 1881, “ “ “	
“ “ “ 1882, “ “ “	2 60
Interest, “ “	1 13
Costs, “ “	3 00
		<hr/>
		\$9 38

and we allowed the statement of claim to be amended accordingly.

The defendant's counsel stoutly protested against our taking this course, but as we gave him an opportunity to confute this certificate if he could, we see no reason why this course should not be taken, and the suit disposed of without further litigation.

The learned Judge who tried this case, supposing that the land in question was sold only for the taxes of 1880, dismissed this action on the authority of *McNaughton v. Wigg*, 35 U. C. R. 111.

Assuming that the land had been sold for the taxes of 1880 only, and that *McNaughton v. Wigg* is good law, I should have great difficulty in holding that, during the existence of the relationship of landlord and tenant, the tenant could buy a title adverse to his landlord's title without his consent, and hold it against his landlord.

I think that equity under such circumstances, having regard to the relationship existing between the landlord and tenant, would hold the tenant to be a trustee for the landlord of a title so acquired, and *Matthew's Appeal* 104, Penn. 444, supports this view. See 11 Geo. II., ch. 19, secs. 11 and 12; R. S. O. ch. 51, sec. 58; *Smart v. Cottle*, 10 Gr. 59.

The covenant discussed in *McNaughton v. Wigg* was not the same in terms as the covenant in this case; but if it were the same in effect, and if the view I have just presented were not sustainable, and the land had been sold for the taxes of 1880 only, I would have much difficulty in following *McNaughton v. Wigg*, for I do not see how the covenant in this case can be construed so as not to embrace the taxes for 1880.

All difficulty in the case, however, disappears when we find that a portion of the taxes for which the land was sold was taxes for the year 1882, which the defendant was clearly bound to pay.

He cannot hold the title so acquired against the lessors and against the plaintiff, but must be declared a trustee thereof for the lessors and the plaintiff, according to their respective interests, and he must pay the costs of this action. See *Haskell v. Putnam*, 42 Me. 244; *Duffit v. Tuborn*, 28 Kan. 292.

STREET, J.—The lease by Knott and others to the defendant and Wilkinson is dated 1st October, 1880, and is for a term of four years from that date. The mortgage from the lessors to the plaintiff, under which she claims title, is dated 17th March, 1881, and the treasurer's deed to the defendant, under which he claims title, is dated 26th Dec., 1884, and recites a warrant dated the 14th July, 1883, to sell for arrears of taxes accrued to 31st December 1882, and a sale on 5th December, 1883, in pursuance of the warrant.

The action is brought not to recover possession of the land, but to remove the defendant's deed as a cloud upon the title, or to have the defendant declared a trustee for the plaintiff of the title acquired under it. The question comes up therefore as one of title and not of possession.

In the absence of any duty on the part of the defendant to have paid the taxes for which the land was sold, I can see no principle upon which his title acquired under the tax sale should be taken from him. The creation of the ordinary relation of landlord and tenant does not impose on the tenant the disability arising from a fiduciary relationship, beyond this, that the tenant can not claim, as against the landlord, at the end of his term, any rights which he has acquired solely by reason of the existence of his tenancy and his possession under it; but I know of nothing to prevent his purchasing during his tenancy a title paramount to that of his landlord and obtaining the benefit of it at the end of his term. The creation even of the

relationship of mortgagor and mortgagee has been considered in the case of *Kelly v. Macklem*, 14 Gr. 29, not of itself to disentitle the mortgagee to become purchaser at a sale for taxes of the lands mortgaged to him, unless he make use of his position of mortgagee in thus obtaining title.

I am of opinion that in the present case there was nothing to prevent the tenant from purchasing, at tax sale, the lands demised to him, provided the taxes for which the land was sold had not become payable through his own default.

There is nothing in the evidence given at the trial, nor in the exhibits appearing to have been used, to shew at what time the taxes became due for which the land was sold, for the sheriff's deed merely states that the sale was for taxes "accrued to 31st December, 1882," which does not at all define the period at which they accrued, and the treasurer's certificate found with the papers does not seem to have been in any way referred to at the trial, or to have been admitted at any time to be evidence of the facts stated in it. I am of opinion, however, that under the terms of the lease the lessees were bound to pay not only the taxes which became due after their term began, but those which were already due at that time.

The covenant by the lessees is that they "will from time to time, and at all times during the said term well and truly pay, or cause to be paid, all taxes, rates, levies, duties, charges, assessments, and impositions whatsoever whether parliamentary, municipal, or otherwise, which now are, or which during the continuance of the said term hereby demised shall at any time be rated, charged, assessed, or imposed on said premises, or any part thereof."

There is here a covenant that the lessees would pay all taxes, which at the date of the lease were charged, or which during the continuance of the term should become charged upon the demised premises. They were, therefore, bound to protect the interest of the lessor against any sale for taxes which had accrued, or should accrue during the term, and cannot set up against the lessor or his assigns a title which

one of themselves had acquired only by reason of a breach of covenant which he had himself committed.

In *McNaughton v. Wigg*, 35 U. C. R. 111, which was cited upon the argument as an authority against such a construction, the covenant of the lessee was materially different. He covenanted to pay all taxes which then were, or should at any time be, rated, charged, or imposed *for or in respect* of the demised premises, and it was held by the majority of the Court that the words, "all taxes which now are," referred to the character of the taxes assessable against the land when the lease was made, and the words, "or which shall at any time," referred to the possible imposition of taxes of some other character in the future.

This conclusion, so far as authority was concerned, was based upon the judgment of Parke, B., in *Hirst v. Hirst*, 4 Ex. 571, upon a covenant which is in its terms more like the one in question here than that which came up in *McNaughton v. Wigg*. The difficulty before the Court in *Hirst v. Hirst* was created by an exception out of the covenant of a certain class of taxes, which rendered it impossible to construe the covenant in accordance with the natural meaning of the words used without freeing the lessee from the payment of any taxes whatever, and it therefore became necessary to construe the words used in a forced manner, or, as it is put by Parke, B., "in their secondary sense," so as to carry into effect the meaning which it was thought they must have been intended to convey.

In *McNaughton v. Wigg* the facts before the Court do not seem to have rendered necessary any other than the natural construction of the words used, and Wilson, C. J., who dissented from the majority of the Court, expresses a strong opinion that they should be construed in their natural sense as binding the lessee to pay the amount of the taxes which had accrued before the date of the lease. I do not feel pressed with the authority of the case of *McNaughton v. Wigg*, therefore, because of the difference in the wording of the covenant, which was then

under consideration, from that now before us, and I think we are at liberty, and are bound to construe the words here in their natural and primary sense as binding the lessees to pay any taxes then charged against the property and any which might be afterwards charged upon it.

No application was made to set up as an answer that this provision in the lease was not in accordance with the real agreement between the parties, although it was stated that notice had been given of such an application, and evidence was admitted which could only have been let in as a basis for a reformation of this provision by restricting it to taxes accrued after the death of the lessee. I do not think, however, that it would be proper to allow the contract to be reformed in this action, or as against this plaintiff, who would plainly be entitled to set up, as an answer to any proposed reformation prejudicing her, the defence of a purchase for value without notice.

I think, therefore, that the motion should be allowed, that the verdict for the defendant should be set aside, and that the title acquired by the defendant under the tax sale should be declared to be vested in the plaintiff, subject to any equity of redemption to which her title as mortgagee is subject, and that the defendant should pay the costs of the suit.

FALCONBRIDGE, J., being engaged at the Assizes, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. BEEMER.

Criminal law—Quashing conviction—Forum—O. J. Act—Canada Temperance Act—Police Magistrate—Adjudication outside of territorial jurisdiction—41 Vic. ch. 4, sec. 9, (O.)

The jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exercisable by them respectively sitting in term; the Courts or Divisions of the High Court of Justice mentioned in sub-sec. 3 of sec. 3 of the Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective Courts or Divisions are analogous to and represent the sittings of the former Courts of Common Law in term, and it is to the sittings of these Courts or Divisions that applications to quash convictions must now be made, having regard to sec. 87 and rule 484 of the O. J. Act, and of R. S. C. ch. 174, sec. 2, sub-sec. 1, and sec. 270. These Courts or Divisions are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. Sec. 28 of the Act, upon which the supposition that a single Judge sitting in Court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only.

And where a single Judge sitting in Court heard and determined a motion to quash a conviction, an appeal to the Judges of the Queen's Bench Division from his decision, refusing to quash such conviction, was treated as a substantive motion to quash the conviction.

The police magistrate for the county of Brant, whose commission excluded the city of Brantford, convicted the defendant of an offence against the Canada Temperance Act committed at a place in the county outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford.

Held, that the magistrate had no jurisdiction to adjudicate in the city of Brantford, and that what he did was not authorized by 41 Vic. ch. 4, sec. 9, (O.)

THE defendant was on 29th November, 1886, at Brantford, in the county of Brant, convicted before James Grace, Police Magistrate for the county of Brant, for that he did between 24th September and 24th November, 1886, at the village of St. George, in the county of Brant, a place wherein the second part of the Canada Temperance Act then was in force, unlawfully sell intoxicating liquor contrary to the Canada Temperance Act, 1878.

The information upon which the said conviction was had was laid in the city of Brantford, and the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford.

The conviction having been brought into this Court by *certiorari*, McKenzie, Q. C., on 14th January, 1887, upon the affidavits and papers filed upon the motion for *certiorari*, and upon the *certiorari* and the conviction and papers returned therewith, obtained from Galt, J., sitting in single Court, an order *nisi* to quash the said conviction, upon the ground, among others, that all acts and proceedings were taken by and had before the convicting magistrate having reference to an offence alleged to have been committed in the county of Brant, outside the city of Brantford, and having been so taken and had in said city, such magistrate had no jurisdiction to entertain or perform the same.

The commission was produced under date of 17th November, 1886, appointing James Grace the convicting magistrate to be Police Magistrate for the said county of Brant, exclusive of the city of Brantford.

This order *nisi* was afterwards, on the 3rd February, 1887, discharged with costs by O'Connor, J., sitting in single Court. Thereupon McKenzie, Q. C., gave notice of appeal to this Court, which came on to be heard on the 20th May, 1887, and notice having been directed to be given to the Minister of Justice and to the Attorney General for Ontario, it came on again to be heard on the 25th and 28th days of November, 1887, when *McKenzie*, Q. C., appeared for the motion, and *Irving*, Q. C., *Moss*, Q. C., and *Delamere*, contra.

February 6, 1888. ARMOUR, C. J.—If a Judge sitting in single Court had jurisdiction to hear and determine this motion to quash this conviction, there is no appeal from his decision to this Court; but if he had not, we ought to treat this motion, by way of appeal from his decision, as a substantive motion to this Court to quash this conviction: R. S. O. ch. 50, sec. 282; *Regina v. Fee*, 13 O. R. 590.

It is necessary, therefore, to ascertain whether a Judge sitting in single Court has jurisdiction to hear motions to quash convictions, and in order to do so it is necessary to determine where such jurisdiction resided at the time of the passing of the Judicature Act.

The Court known as the Practice Court, it having no statutory designation, was created by 7 Wm. IV., ch. 1, providing that it should and might be lawful for one of the Judges of the Court of King's Bench, when occasion should require, while the other Judges of the said Court were sitting *in banc*, to sit apart from them for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court, in the same manner and with the same force and validity as might be done by the Court sitting *in banc*.

This provision was repealed by 12 Vic. ch. 63, sec. 10, upon the creation of the Court of Common Pleas.

And by 13 & 14 Vic. ch. 51, sec. 3, it was provided that at any time wherein Her Majesty's Superior Courts of Common Law at Toronto might by law sit *in banc* it should and might be lawful for any one Judge of either of such Courts to sit *in banc* apart from his brethren, either while they were actually so sitting, or while their sittings within such time should be suspended or adjourned, and every such Judge, so sitting apart *in banc* as aforesaid, should have all the same powers and authority as belonged to or might thereafter be vested in either of such Courts, touching or concerning, or in any way relating to the business of adding or justifying bail, discharging insolvent debtors, administering oaths, and hearing and determining matters on motion, and making rules and orders in causes and business depending in either of the said Courts in the same manner and with the same force, validity and effect as might be done by the Court in which such causes or business should be respectively depending. See Con. Stats. U. C. ch. 10, sec. 9.

By 40 Vic. ch. 8, sec. 3, (O.) it was provided that the Practice Court held under the ninth section of chapter ten of the Consolidated Statutes of Upper Canada should be abolished, and the said section should be repealed, and all the powers of said Court and the business theretofore transacted therein

should thereafter be respectively exercised by and transacted in the Court held under the nineteenth section of the Administration of Justice Act, 1874.

The Practice Court had no power to grant a rule *nisi* to quash a by-law : *Re Sams & Toronto*, 9 U. C. R. 181 ; nor a rule *nisi* for a mandamus : *Crysdale v. Moorman*, 17 C. P. 218 ; *Re Williams v. Great Western R. W. Co.*, 26 U. C. R. 340 ; but see *Ford v. Crabb*, 8 U. C. R. 275 ; nor a rule *nisi* for a *habeas corpus ad subjiciendum* : *Regina v. Smith*, 24 U. C. R. 480 ; *In re Andrew Smith*, 1 U. C. L. J. N. S. 241.

There are no cases reported, as far as I know, in which the Practice Court ever assumed to exercise jurisdiction over convictions, and the general opinion, founded on tradition, is, that it never did assume such jurisdiction, and I think it clear, from the words of the statutes giving it jurisdiction, and from the scope of the cases above referred to, that the Practice Court had no jurisdiction over convictions.

In cases of difficulty, where it had jurisdiction, it was customary to make the rules granted by it returnable in the full Court : *Newman v. Niagara Dist. Mutual Ins. Ass. Company*, 25 U. C. R. 435.

There was no provision in the Practice Court Acts for an appeal to the full Court, nor was there any appeal from its decisions to the Court of Appeal until alterations in the law relating to appeals gave an appeal from its decisions to the Court of Appeal : *Notman v. Rapelje*, 6 O. S. 560 ; *Brown v. Overholt*, 14 U. C. R. 64 ; *Carroll v. Stratford*, 7 Pr. R. 11.

The provisions of section 21 of The Administration of Justice Act 1873, and of sections 17-20, inclusive, of The Administration of Justice Act 1874 (R. S. O. ch. 39), have been determined by the Court of Appeal to have had relation only to civil controversies; and with regard to these provisions that Court said, in *Re Boucher*, 4 A. R. 191, "It is under the powers there conferred that we are asked to hold that the decision of the Chief Justice of the

Queen's Bench is equivalent to a decision of the Court in Term. We are unable to arrive at that conclusion. The Provincial Legislature, in making these special provisions for the transaction of the business of the Courts, was only dealing with civil controversies. This is, we think, quite apparent from the language used, and from the whole scope of the Acts; indeed, to extend these provisions to such a case as the present would be to alter criminal procedure, over which the Provincial Legislature has no jurisdiction."

The jurisdiction, therefore, to quash convictions, it appears to me, at the time of the passing of the Judicature Act resided in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exercisable by them respectively sitting in Term.

The Judicature Act, sec. 87, provides that "nothing in this Act or the schedule thereto affects or is intended to affect the practice or procedure in criminal matters, or matters connected with Dominion Controverted Elections, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions;" and Rule 484 of the schedule provides that "nothing in these rules shall be construed as intended to affect the practice or procedure in criminal proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas Divisions."

The Dominion Statute 46 Vic. ch. 10, sec. 2, provides that "the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice shall be the same as the practice and procedure in similar causes and matters before the establishment of the said High Court;" and sec. 5 provides that "when any question of law is reserved under the provisions of the chapter of the Consolidated Statutes of Upper Canada, intituled 'An Act respecting the reservation of points of law in criminal cases,' or under the provisions of the Act passed in the 38th year of Her Majesty's reign, intituled 'An Act to amend the law for the more speedy trial in certain cases of persons charged with felonies and misdemeanors in the Provinces

of Ontario and Quebec,' such reservation shall be to the Justices of any Division of the High Court:" R. S. C. ch. 174, sec. 2, sub-sec. 1, and sec. 270.

The Judicature Act, section 9, provides that the High Court of Justice "shall have the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery * * and shall be deemed to be, and shall be a continuation of the said Courts respectively;" and section 10, "that from and after the commencement of this Act the several jurisdictions vested in the said High Court of Justice shall cease to be exercised, except in the name of the said High Court of Justice, as provided by this Act, save as otherwise in this Act provided." And section 3, subsec. 3, provides that the Court of Queen's Bench shall thereafter be called the Queen's Bench Division of the High Court, the Court of Chancery shall be called the Chancery Division thereof, and the Court of Common Pleas shall be called the Common Pleas Division thereof: the Judges of the said three Courts or Divisions shall be called Justices of the High Court."

It appears that these several "Courts" or "Divisions" of the High Court, although it is not so expressly stated in the Act, can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice.

Section 12 provides that "the jurisdiction of the High Court of Justice, so far as regards procedure and practice * * where no special provision is contained in this Act, or in any such order or orders of Court with reference thereto, shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective existing Courts if this Act had not been passed."

Sections 23, 24, 25, and 26, providing for the distribution of all causes and matters in the High Court of Justice among the several "Courts or Divisions," the transfer to

these "Courts or Divisions" of all causes and matters pending at the commencement of the Act in the Courts of Queen's Bench, Chancery, and Common Pleas, the assignment of every cause or matter afterwards commenced in the said High Court of Justice to one of these "Courts or Divisions," and the power of transfer from one of these "Courts or Divisions" to another, all shew that these "Courts or Divisions" are respectively to exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice in their respective "Courts or Divisions." And when by Rule 480 provision is made for the sittings of the High Court of Justice it is clear that what is meant is the sittings of the High Court of Justice in its respective "Courts or Divisions," for sub-sec. c. of the rule provides that this provision shall not apply to the Chancery Division.

The sittings of these respective "Courts" or "Divisions" of the High Court of Justice are analogous to and represent the sittings of the former Courts of Common Law in Term, and it is to the sittings of these "Courts or Divisions" of the High Court of Justice that, in my opinion, applications to quash convictions must now be made, and, as has been seen, it is to these "Courts or Divisions" that Crown cases are to be reserved.

These "Courts or Divisions" are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with certain special functions.

The supposition that a Judge sitting in single Court had jurisdiction to quash a conviction was founded upon section 28 of the Judicature Act, which provides that "Every action and proceeding in the High Court of Justice, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single Judge."

This provision clearly refers to civil actions and proceedings, for "action" is defined by sec. 91 of the Judicature Act to mean a civil proceeding, and not to include a criminal

proceeding by the Crown, and it would not be proper construction to give to its yokefellow "proceeding" the meaning of a criminal proceeding from which it is expressly excluded.

Besides, the provisions of sec. 87 and Rule 484 of the Judicature Act and the decision in *Re Boucher*, above referred to, are wholly against such a construction.

I refer to *Regina v. Bunting*, 7 O. R. 118; *In re Hall*, 8 A. R. 135; *Mitchell v. Cameron*, 8 S. C. R. 126; *Regina v. Fee*, 13 O. R. 590, and *Regina v. McAuley*, 14 O. R. 643.

This being a prosecution under the Canada Temperance Act, 1878, the Summary Convictions Act is applicable to it, and its provisions and the provision of the Interpretation Act that if anything is directed to be done by or before a magistrate, or a justice of the peace, or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done, shew that the objection taken to the conviction must prevail.

"It is a general rule that all judicial acts exercised by persons whose judicial authority is limited as to locality must appear to be done within the locality to which the authority is limited:" per Wightman, J., in *Regina v. Totness*, 11 Q. B. 80. "Then, if the act be judicial, I see no distinction between this case and those in which we have not once or twice but often, decided that the justices acting judicially must appear to be acting *in* their jurisdiction as well as *for* it": per Patteson, J., S. C. See also *Regina v. Cumpton*, 5 Q. B. D. 341.

It is said, however, that 41 Vict. ch. 4 (O.), permits what the convicting police magistrate did in this case; but I do not so construe this Act.

It provides for the appointment of a police magistrate for a county, or any part of a county, and that any magistrate so appointed shall have, and exercise, within the county or territory for which he is appointed, all the powers, &c., and that no such police magistrate shall have authority to act in any case for any city, town, or village

(that is, within the county or territory for which he is appointed) which has a police magistrate of its own, except at the General Sessions of the Peace, or in the case of the illness, absence, or at the request of such last-mentioned police magistrate; but nothing herein contained shall be construed to prevent a police magistrate appointed under this Act from acting within any such city, town, or village (that is, within the county or territory for which he is appointed) in respect of any case arising outside of such city, town or village.

If the commission of this convicting police magistrate had included the city of Brantford, although he would not have had authority to act in any case for the city, except as above, because it had a police magistrate of its own, yet he could have acted within the city of Brantford in respect of cases arising outside of it, and within the county or territory for which he was appointed; but his commission having excluded the city of Brantford, he had no right to act within the city.

He was no doubt *ex officio* a justice of the peace for the whole county, including the city of Brantford, (sub-sec. 2, sec. 9.) but as a justice of the peace he had no authority to try cases under the Canada Temperance Act, 1878; and sub-sec. 4 of sec. 9 only applies to "whatever is authorized by any statute in force in this Province, relating to matters *within the legislative authority of the Legislature of the Province*, and consequently does not apply to the trial of cases under the Canada Temperance Act, 1878.

I understand that a different conclusion as to the proper construction of this statute has been arrived at by my brother Robertson, and, on appeal from him, by the Common Pleas Division, in *Regina v. Lee (a)*; but as there is no appeal from our decision, we must give our independent judgment upon the construction of it.

If the proper construction of this statute had permitted the convicting police magistrate to do as he has done in

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this case we would then have had to consider whether such a provision was within the powers of the Local Legislature, as being procedure in a criminal matter. See also 50 Vic. ch. 11, sec. 7, (O.)

In my opinion the conviction must be quashed, but without costs, and no action shall be brought against the convicting police magistrate, or against any officer acting under any warrant issued to enforce the conviction.

FALCONBRIDGE, J., concurred.

STREET, J. not having been appointed a member of the Court at the date of the argument, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

HAISLEY V. SOMERS.

*Assessment and taxes—Tax sale—Duty of treasurer at and after sale—
R. S. O. ch. 180, secs. 129, 137.*

At a sale of land for taxes, the treasurer is bound under R. S. O. ch. 180, sec. 137, if he sells any particular part of a lot, to sell in preference such part as he may consider best for the owner to sell first, and section 129 does not relieve him from this duty; and for such purpose he must obtain the necessary information to enable him to arrive at a sound judgment thereon.

Section 129 applies to the duty of the treasurer *before* the sale: section 138 to his duty *at and after* the sale, and before he grants his certificate: History of the provisions of these sections traced.

Semble. It is sufficient to sell so much of a lot as may be necessary to secure the payment of the taxes due, and the particular part need not be determined until the certificate is given to the purchaser.

Where the treasurer, before he granted his certificate, knew that there was a house upon the lot, and although within a few minutes walk of his office, did not take the trouble to ascertain on what part of the lot the house was situated, but gave his certificate describing the part sold so as to include the greater part of the house.

Held [affirming on this point the judgment of Proudfoot, J., 13 O. R. 600,] that the sale not having been fairly conducted was invalid.

THIS was an appeal by the defendant from a judgment of Proudfoot, J., reported in 13 O. R. 600, where the facts fully appear.

26th November, 1887, *Lennox*, for the defendant who appeals.

McCullough, contra.

The authorities are referred to in the judgment.

February 6, 1888. ARMOUR, C. J.—The statute 6 Geo. IV. ch. 7, sec. 12, provided that sales of lands for taxes should be by public auction, and prescribed the mode of selling them; and section 13 prescribed the mode of describing the lands sold; and section 14 provided that in every case in which from the position or description of the tract the mode last mentioned could not be pursued, then *it should be in the discretion of the sheriff to expose to sale such portion of the lot or parcel of land as should appear to him most for the interest of the proprietor thereof.*

The statute 7 Wm. IV. ch. 19, provided that in all future sales of land for arrear of taxes *it should be lawful for the sheriff or other officer, whose duty it was to offer the same, at his option to put up and adjudge to the purchaser of any part of a lot liable to be sold for such arrears such part of the said lot as he might in his discretion think best for the interest of the proprietor, anything in any Act of the Parliament of this Province to the contrary notwithstanding.*

The statute 13 & 14 Vic. ch. 66, repealed all Acts and provisions of the law relative to assessments, including the provisions above quoted, and the statute 13 & 14 Vic. ch. 67, provided for a more equal and just system of assessment, and sec. 53 provided that if no person should appear to pay the taxes at the time and place appointed for the sale of lands so taken for taxes, the sheriff or high bailiff should sell by public auction so much of such lands as should be sufficient to discharge such taxes, with the interest thereon, and all lawful charges incurred in and about such sale, and the collection of such taxes, *selling in preference such part of such real estate as he might consider it most for the advantage of the owner to sell first.*

This Statute was repealed by "The Consolidated Assessment Act of Upper Canada, 1853," 16 Vic. ch. 182, sec. 59 of which provided that if the taxes should not have been previously collected, or if no person should appear to pay the taxes at the time and place appointed for the sale, the sheriff should sell by public auction so much of such lands as should be sufficient to discharge such taxes, and all lawful charges incurred in and about such sale, and the collection of such taxes, *selling in preference such part of such real estate as he might consider it most for the advantage of the owner to sell first.*

This provision of 16 Vic. ch. 182, sec. 59, appears in the Consolidated Statutes for Upper Canada, ch. 55, as sec. 137.

The statute 27 Vic. ch. 19, sec. 4, provided that the treasurer and sheriff of every county should not be required to enquire before sale of lands for taxes whether there was any distress upon the land, nor should they be bound to enquire into or form any opinion of the value of the land.

The statute 29-30 Vic. ch. 53, sec. 139 provided that if the taxes had not been previously collected, or if no person appeared to pay the same at the time and place appointed for the sale, the treasurer should sell by public auction so much of the land as might be sufficient to discharge the taxes and all lawful charges incurred in and about the sale and collection of the taxes, *selling in preference such part as he might consider best for the owner to sell first.* In offering such lands for sale it should not be necessary to describe particularly the portion of the lot which should be sold, but it should be sufficient to say that he would sell so much of the lot as should be necessary to secure the payment of the taxes due, and section 131 contained the same provision as 27 Vic. ch. 19 sec. 4

The statute 32 Vic. ch. 36, secs. 130 and 136 (O), contained practically the same provisions as 29-30 Vic. ch. 53 secs. 131 and 139, and form secs. 129 and 137 of R. S. O. ch. 180. Sec. 129 of R. S. O. ch. 180 provides that it shall not be the duty of the treasurer to make enquiry before effecting a sale of lands for taxes, to ascertain whether or not there is any dis-

tress upon the land, nor shall he be bound to enquire into or form any opinion of the value of the land; and sec. 137 provides that if the taxes have not been previously collected, or if no person appears to pay the same at the time and place appointed for the sale, the treasurer shall sell by public auction so much of the land as is sufficient to discharge the taxes and all lawful charges incurred in and about the sale and the collection of the taxes, *selling in preference such part as he may consider best for the owner to sell first*; and in offering or selling such land it shall not be necessary to describe particularly the portion of the lot which is to be sold, but it shall be sufficient to say that he will sell so much of the lot as may be necessary to secure the payment of the taxes due.

I have thus traced the history of the provisions contained in sections 129 and 137, and although they may appear at first sight to be somewhat inconsistent, yet I think that when closely viewed they are not so, but may be so construed that full effect shall be given to each of them.

Section 129 applies to the duty of the treasurer *before the sale*; section 137 to his duty *at and after the sale*, and before he grants his certificate.

Section 129 provides in effect that the treasurer shall not *before effecting a sale of land for taxes*, be bound to enquire into or form any opinion of the value of the land. I take the meaning of the words "before effecting a sale of lands for taxes" to be before proceeding to perform the duty cast upon him by section 137.

The reason of this provision being enacted was, that the Court of Chancery had determined that it was the duty of the sheriff before proceeding to sell lands for taxes to acquaint himself with the value of them in order that he might inform intending bidders of their value, and might prevent the lands being sacrificed: *Henry v. Burness*, 8 Gr. 345.

The duty of the treasurer *at the sale*, if he sells any particular part of a lot, is to sell in preference such part

as he may consider best for the owner to sell first. But it is not necessary for him at the sale to sell any particular part of a lot, but it is sufficient for him to say that he will sell so much of the lot as may be necessary to secure the payment of the taxes due, and in such case the particular part of the lot sold is not determined until he gives his certificate to the purchaser (see sections 140-145); in which case it is his duty, after the sale and before he grants his certificate, describing the particular part of the lot sold, to determine which part of the lot he considers best for the owner to grant his certificate for.

I am of opinion that the duty cast upon the treasurer by sec. 137, of selling in preference such part as he may consider best for the owner to sell first, is a duty from which he is not at all relieved by the provisions of sec. 129 and is an independent duty, and one that cannot be ignored, but one that must be performed by him, and that for that purpose he must obtain the necessary information to enable him to arrive at a sound judgment thereon. See *Massingberd v. Montague*, 9 Gr. 92; *Templeton v. Lovell*, 10 Gr. 214; *Henry v. Burness*, 8 Gr. 345; *Deverill v. Coe*, 11 O. R., per Wilson, C. J., at p. 239.

The evidence shows that the treasurer before he granted his certificate in this case knew that there was a house upon the lot, and although the lot was within a few minutes walk of his office he did not take the trouble to ascertain on what part of the lot the house was situated, but gave his certificate describing the part sold so as to include the greater part of the house.

I do not think that under these circumstances the sale to the defendant can be said to have been fairly conducted.

The judgment of the learned Judge must be upheld upon this ground, but I express no opinion upon the other grounds upon which the learned Judge rested his judgment, and I cast no doubt upon them.

The description in the deed to the defendant is, "the north one-tenth part of an acre of lot No. 4 on the west side of Sandford street in the said town of Barrie, one-

tenth of an acre." The whole lot contained one-quarter of an acre. It was advertised as one-fifth of an acre, and if the evidence of the treasurer is to be relied on he sold one-tenth of the lot, not one-tenth of an acre of the lot, but he gave the deed for the north one-tenth part of an acre of the lot, whatever that may mean. I draw attention to this as it may be that the deed is void, and because the treasurer improperly charged one dollar for this description as if he had paid a surveyor for it under sec. 145. Objection might also be taken to the validity of the assessment of the lot as described in such assessment.

The motion will be dismissed, with costs.

FALCONBRIDGE J., concurred.

STREET, J., not having been appointed a member of the Court at the date of the argument took no part in the judgment.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

HEDDLESTONE V. HEDDLESTONE.

Will—Devise of land—Restraint on alienation—Invalidity of devise.

Testator devised as follows: "I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them either by sale, by mortgage, or otherwise, except by will to their lawful heirs."

Held, that the condition imposed by the will was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restrictions above mentioned.

On the 27th January, 1888, *Marsh* for the plaintiff, James Heddlestone, (one of the devisees under the will of the late Robert Heddlestone), moved for judgment on the statement of claim.

Hoskin, Q.C., for the infants, submitted their rights and interests to the protection of the Court.

The motion asked for the judgment of the Court as to the construction which should be placed upon a clause in the will of the late Robert Heddlestone, dated the 25th of January, 1864.

The testator by his will gave a life-estate to his wife, Nancy Heddlestone (since deceased), in the south-west one-half of lot No. 10 in the 10th concession of the township of Elmsley, in the county of Lanark. Subject to this life-estate the testator by his will devised as follows: "And at my wife's death the above lot, that is to say, the south-west one-half of lot 10, in the 10th concession of North Elmsley, to become the property of my son James Heddlestone * * I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son William, and to my son Robert, and to my son James, shall not be disposed of by them either by sale, by mortgage, or otherwise, except by will to their lawful heirs."

It was urged that this proviso in the will formed a restraint upon alienation, and should be declared void.

February 10, 1888.—MACMAHON, J.—The question to be considered is, whether the language of the testator creates merely such a partial restraint on the disposing power of the devisee as is permissible to annex to a devise of the fee; or whether the restraint attempted to be imposed is not of such a character that it is repugnant to the estate devised, and therefore invalid.

In *Renaud v. Tourangeau*, L. R. 2 P. C. 4, where a testator in Lower Canada devised and bequeathed his movable and immovable property in specified portions to his children, and directed that they should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the immovables, being in their respective lots as devised by the will, until the period of twenty years from his death, the Privy Council held that such a

tenth of an acre." The whole lot contains an acre. It was advertised as one-fifth of the evidence of the treasurer is to be a tenth of the lot, not one-tenth of an acre. The deed gave the deed for the north one-half of the lot, whatever that may mean, as it may be that the deed is void if improperly charged one does not know. Had paid a surveyor for it. It also be taken to the value of the land described in such assessment.

The motion will be granted.

FALCONBRIDGE.

STREET, J.

the Court
the judge

1881, a testator devised an estate to his son, with a proviso that if the son, or any person claiming through or under him, should desire to sell the estate or any part thereof, he should first offer it to the testator's widow, or to the Court, at the option of the same at the price of the whole, and a proportionate price for any part thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was at the date of the will, and at the time of the testator's death, £15,000. It was held that the proviso amounted to an absolute restraint on alienation during the life of the testator's widow: that it was void in law; and that the son was entitled to sell the estate as he pleased without first offering it to the widow at the price named in the will.

The judgment of Pearson, J., in *Rosher v. Rosher*, while not going the length of saying that *In re Macleay*, L. R. 20 Eq. 186, was wrongly decided by Sir George Jessel, M. R., yet questions some of the principles of law which the Master of the Rolls lays down in that case as governing the restrictions on alienation engrafted, or attempted to be engrafted, on a devise in fee.

The devise *In re Macleay* was as follows: "I give to my dear brother John the whole of the property of my late dear aunt Clara Perkins, consisting of the manor of Bletchingley, in the county of Surrey, and the Pendel Court

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mansion, with the lands belonging to it, on the condition that he never sells it out of the family." And in his judgment Sir George Jessel quotes from Littleton, p. 222 a, as follows: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law; for if such a condition should be good, then the condition should oust him of all the powers which the law gives him, which should be against reason, and therefore such a condition is void. But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, naming his name, or to any of his heirs, or of the issues of such a one, or the like, which conditions do not take away all powers of alienation from the feoffee, then such condition is good." He then proceeds: "So that, according to the old books, Shepherd's Touchstone being to the same effect, the test is, whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form. Now you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited; first, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale. A person may lease, or he may mortgage, or he may settle; therefore it is a more limited restriction on alienation in that way."

Pearson, J., in commenting on this in *Rosher v. Rosher*, 26 Ch. D., at p. 819, says: "I should be very sorry to do Sir George Jessel any injustice, and I must honestly say that in attempting to criticise so able and learned a Judge I am always afraid of falling into some error myself, and I

am not quite certain that I understand correctly the extent to which in these passages he means to go. If he means to assert that, provided you give a power to mortgage or lease you may restrain the power to sell, all I can say is that I most respectfully differ from him; and I cannot understand how, after he had cited the maxim from Coke which he had quoted, he should have tried to lay down any such doctrine."

One cannot help thinking after reading the very able judgment of Mr. Justice Pearson in *Rosher v. Rosher* that the judgment of Sir George Jessel, M. R., *In re Macleay* is to say the least, somewhat misleading.

The judgment of Mr. Justice Pearson in *Rosher v. Rosher*, 26 Ch. D. 801, was that a condition in absolute restraint of alienation annexed to a devise in fee, even though its objection is limited to a particular time, *e.g.*, to the life of another living person, is void in law, as being repugnant to the nature of an estate in fee.

In the case under consideration the condition annexed to the devise to the plaintiff restrains him from disposing of the land either by sale, or by mortgage, or otherwise except by will to his lawful heirs. This in effect "takes away the whole power of alienation substantially," to quote the language of the judgment *In re Macleay*, L. R. 20 Eq., p. 189.

I think the condition imposed by the will restricting the plaintiff from disposing of the lands mentioned in the devise to him by sale, or by mortgage, or otherwise except by will to his lawful heirs is invalid, and the plaintiff is entitled to hold the land freed from the conditions mentioned.

Costs out of the estate.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

CLEDENAN V. BLATCHFORD.

*Way—Conditional grant of—Duty to maintain fences and gates on—
Rights of grantor.*

Plaintiff's predecessor in title had granted to defendant's predecessor in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, and put gates at each end of it, which, after remaining many years, rotted away.

Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely at the at the sides of the way in question, but also at the ends of it, where they might have gates as part of the fences.

Held, also, that even if this was not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled, himself, to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used.

Trespass to land, tried before Galt, C. J., without a jury, at Woodstock, when the learned Chief Justice found in favor of the plaintiff. The facts appear in the judgments.

In Michaelmas Sittings, 13th December, 1887, *Lash*, Q.C., moved pursuant to notice, on behalf of the defendant, to set aside the judgment for the plaintiff, and to enter judgment for the defendant on the law, evidence, and weight of evidence, and because on the proper construction of the bond the defendant was not bound to keep anything but the road in repair, and that he was not bound to maintain gates.

Aylesworth shewed cause.

February 6, 1888. ARMOUR, C. J.—In 1844 Daniel Thackle and Charles Hugill were respectively the owners in fee of the south-east quarter of lot number sixteen, and the south half of lot number fifteen, in the fourth concession of East Oxford, and one Walter W. Clendenan was the owner in fee of the residue of lot number sixteen, and through the north halves of said lots number fifteen and sixteen the stage-road ran, practically parallel with the concession line.

On the 27th January, in that year, the said Walter W. Clendenan, by his bond bearing that date, became bound to the said Thackle and Hugill in the penal sum of two hundred pounds of lawful money of this Province, which bond was subject to the following condition: "The condition of this obligation is such that if the above-named Daniel Thackle and Charles Hugill shall fence, or cause to be fence (*sic*), and kept in repair, a road two rods wide on the east side leading to the stage road lot number sixteen, in the fourth concession of Oxford east, the above-named Daniel Thackle and Charles Hugill, their heirs, administrators, or assigns, shall have the privilege of the above-mentioned road; otherwise this obligation to be null and void."

At the time this bond was given no road had been laid out, but within a year or two afterwards the obligees fenced the road and put gates at the end next the stage road, and at the end next their respective lands.

The plaintiff is the successor in title to said Walter W. Clendenan, and one Lund and the defendant are the successors in title to Thackle and Hugill respectively; and it was admitted that the plaintiff and defendant were respectively entitled to the same rights, and subject to the same liabilities with respect to the said road, as were their predecessors in title.

The fence and gate at the end of the road next the stage road having gone to decay, and the defendant and Lund having neglected to replace them, the plaintiff put in a post near where the old gate post stood, and was intending, as he said, to fence that end of the road and put a gate there, and the defendant tore it down, and hence this action was brought.

It seems to me that according to the proper construction of this condition the obligees were entitled to a right of way two rods wide from their lands along the east side of the land of the obligor to the stage road, and that such right was dependent upon their keeping such right of way fenced, not merely at the side but also at the ends, where they might have gates, gates coming properly within the

term fence, within the meaning of the words used. See *Vilaire v. Great Western R. W. Co.*, 11 C. P. 509.

That this was according to the intention of the parties to the instrument there can be no doubt, for the obligees at once went on in pursuance thereof and fenced this right of way, not only at the sides but at the ends, using gates at the ends as part of the fence.

The defendant and Lund having neglected to keep up this fence at the end of the right of way next the stage road, the plaintiff was entitled to do himself what they had neglected to do, and the action of the defendant, therefore, in tearing down what the plaintiff had done, was unlawful.

Even if upon the proper construction of this instrument the obligees were not bound to fence the ends of this right of way, I am opinion that the obligor, having regard to the purpose for which the right of way was granted, might have done so, putting gates therein of such width and construction as would reasonably enable the obligees to conveniently use their right of way.

Notwithstanding the grant of this right of way, the obligor was still the owner of the soil, and had the right of full dominion over it, except so far as a limitation of such right was essential to the proper enjoyment of the right of way

It might be absolutely necessary to his useful exercise of such right of dominion that it should be kept fenced, and if he kept it fenced with gates which did not unreasonably interfere with the use of it by the obligees, I think he might do so, there being nothing in the grant implying a negation of his right to do so. And in this view of it also the defendant's act was unlawful.

See *Bean v. Coleman*, 44 N. H. 539; *Maxwell v. McAtee*, 9 B. Monro 20; *Bakeman v. Talbot*, 31 N. Y. 366; *Houpes v. Alderson*, 22 Iowa 162.

I think it ought to be declared that it is the duty of those entitled to and claiming this right of way to keep this right of way fenced, with gates at the ends thereof,

and that the judgment of the learned Chief Justice should be varied accordingly, and that the motion should be dismissed, with costs.

STREET, J.—This is a case in which the obscurity of the language used by the parties in putting their agreement into writing is in a great measure removed by the light of the acts which followed the making of the agreement.

Walter W. Clendenan, the predecessor in title of the plaintiff, bound himself on the 27th January, 1844, to Daniel Thackell and Charles Hugill, the predecessors in title of the defendant, in the penal sum of £200, and the condition of his obligation was that, "if the said Daniel Thackell and Charles Hugill shall fence, or caused to be fenced, and kept in repair, a road two rods wide on the east side leading to the Stage Road, lot No. 16, in the 4th concession of Oxford, East, the above named Daniel Thackell and Charles Hugill, their heirs, administrators or assigns, shall have the privilege of the above mentioned road, otherwise the obligation to be null and void."

This was treated by the parties as a grant of a right of way over the strip of land it indicates, by Clendenan, the obligor, to Thackell and Hugill, the obligees, and within a year after the making of the instrument the obligees fenced it and put a gate at each end. This state of things remained until the gates rotted down, which was many years after they had been erected. The plaintiff lately began to replace the gate at the stage road, and the defendant having thrown down the posts which formed a part of the proposed gate, this action is brought to try the right to maintain it.

As the Chief Justice has pointed out in his judgment the word "fence" may include a gate, and the words of this instrument are therefore entirely consistent with the interpretation put upon them by the original parties to it, as shewn by the erection of fences at each side, and gates at each end of the road. The defendant cannot be

supported in his contention that they do not bear a construction of which they are fairly capable, and in which his predecessors in title, who were the actual parties to the instrument, must have undoubtedly acquiesced.

For this reason, I am of opinion that the rights of the defendant to use this road are to be enjoyed by him only upon condition of his keeping up the fences and gates which are stipulated for in the instrument, including the gate or gates which the plaintiff requires at each end of the roadway, and that the judgment should contain a declaration that such a condition exists.

It is not, I think, necessary to the plaintiff's right to succeed in this action, however, that such a construction should be placed upon the instrument. He would still be entitled to maintain the gate at the stage road, upon the ground that he has not, by merely granting this right of way over this strip of land, precluded himself from maintaining a gate there in order to protect the land, which is the subject of the easement, from the inroads of cattle, provided such gate is not inconsistent with the proper enjoyment of the easement.

To quote the words of Chief Justice Marshall, in *Maxwell v. McAtee*, 9 B. Monro 20: "Nothing passes as incident to such a grant but that which is necessary for its reasonable and proper enjoyment. Notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him, because they are not granted. And for the same reason the exercise of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment."

The existence of this gate was not deemed by the obligees inconsistent with the proper enjoyment of the grant during the many years which elapsed while it was in existence, and the right to maintain it should be taken as being one of the rights which the obligor reserved, even if the obligation to maintain it had not been expressly undertaken by the obligees.

I am of opinion, that with the additional declaration of the rights of the parties which I have suggested, the judgment of the learned Chief Justice of the Common Pleas Division in favor of the plaintiff should be sustained, and their action and this motion be dismissed with costs.

FALCONBRIDGE, J., being engaged at the Toronto Assizes, took no part in the judgment.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. MONTEITH.

Canada Temperance Act, 1878—County of Simcoe—Territorial limits—Stipendiary magistrate for judicial district of Parry Sound—Jurisdiction of.

Defendant was, in the village of Parry Sound, convicted by the Stipendiary Magistrate for the District of Parry Sound for a sale in the township of Humphrey of intoxicating liquor contrary to the Canada Temperance Act, 1878.

Held, that the township of Humphrey was within the territorial limits of the county of Simcoe, and that the Canada Temperance Act being in force in the county of Simcoe was therefore in force in the township of Humphrey.

Judgment of ARMOUR, J., in *Regina v. Shavelear*, 11 O. R. 727, qualified. *Held*, also, that the township of Humphrey formed also part of the district of Parry Sound for certain judicial purposes, and that the stipendiary magistrate for the district of Parry Sound had jurisdiction to try offences against the Canada Temperance Act committed in that township.

THE defendant was, on the 21st day of August, 1886, at the village of Parry Sound, in the district of Parry Sound,

in the county of Simcoe, convicted before Patrick McCurry, Stipendiary Magistrate for the district of Parry Sound, in said county of Simcoe, for that he, the defendant, did on 10th June, 1886, at the township of Humphrey, in the said district and county of Simcoe, being a place wherein the second part of the Canada Temperance Act then was in force, unlawfully sell intoxicating liquors contrary to the Canada Temperance Act, 1878.

On 8th February, 1887, *Fullerton*, obtained an order nisi in the single Court, which was afterwards referred to the full Court, calling upon the magistrate and prosecutor to shew cause why the conviction should not be quashed on the following grounds: (1) The township of Humphrey where the offence, if any, disclosed in the requisition, was committed, was for the purposes of the Canada Temperance Act, 1878, in the Territorial District of Parry Sound, and the said Canada Temperance Act, 1878, was not in force in the District of Parry Sound. (2) If the said township of Humphrey was not in the territorial district of Parry Sound for the purposes of the said The Canada Temperance Act, 1878, it was within the county of Simcoe for such purposes, and the Stipendiary Magistrate for the said district of Parry Sound had not jurisdiction to try the said alleged offence or make the said conviction. (3) The said P. McCurry, either as such Stipendiary Magistrate or otherwise, had not jurisdiction to make the said conviction or any conviction in the premises. (4) The information in the said case did not state any offence over which the said magistrate had jurisdiction, nor did the evidence taken thereunder, and upon which the said conviction was made, disclose any offence over which the said magistrate had jurisdiction.

On the 13th day of December, 1887, *Delamere* shewed cause.

Aylesworth supported the rule.

February 6, 1888. ARMOUR, C. J.—I do not understand that *Regina v. Shavelear*, 11 O. R. 727, determined

that when the territorial limits of a county for municipal purposes differed from its territorial limits for judicial purposes the territorial limits of the county for municipal purposes and not for judicial purposes should be held to be the territorial limits of the county within the meaning of the word county, as interpreted by section 2 of the Canada Temperance Act, for such contention did not arise in that case, and the point is to be considered as still open.

I may here say, that while I agreed in the result of the judgment in *Regina v. Shavelear*, I am not to be taken to have agreed to the construction therein placed upon sections 2, 5, and 12 of the said Act.

The question, however, as to whether the territorial limits of a county for municipal purposes, or its territorial limits for judicial purposes, are to constitute the county within the meaning of that word in the Canada Temperance Act, does not arise in this case, for the township of Humphrey in which this offence was committed, was within the territorial limits of the county of Simcoe, both for municipal and judicial purposes.

By R. S. O. ch. 7, sec. 2, the district of Parry Sound was constituted, and the description therein contained of the said district comprised the said township of Humphrey, and power was, by the said Act, given to the Lieutenant-Governor to appoint a stipendiary magistrate for such district, and the convicting magistrate was the stipendiary magistrate so appointed, and had, therefore, jurisdiction to make, as he did, this conviction within such district for the said offence which was committed therein.

The order *nisi* will therefore be discharged, with costs.

STREET, J.—The question raised upon this motion is, as to the validity of a conviction for an offence against the Canada Temperance Act, made by the stipendiary magistrate for the district of Parry Sound, such offence having been committed in the township of Humphrey.

The township of Humphrey lies within the territorial limits of the county of Simcoe, as defined by paragraph

34 of sec. 1 of cap. 5 R. S. O.: it is also included within the territorial limits of the district of Parry Sound, as defined by sec. 2 of cap. 7 R. S. O. For municipal purposes, and for all purposes other than certain judicial purposes set forth in the last named Act, it is as much a part of the county of Simcoe as any other part of that county. The Canada Temperance Act is in force in the county of Simcoe, but not in the district of Parry Sound. By subsec. (b) of sec. 103 of the Canada Temperance Act, prosecutions for offences against that Act may be brought in the Province of Ontario "before any stipendiary magistrate, or before any two justices of the peace for the county, city, or district wherein the offence was committed.

By sec. 4 of ch. 7, R. S. O., the Lieutenant-Governor is authorized to appoint a stipendiary magistrate for the district of Parry Sound, and he has exercised the authority thus vested in him by appointing Patrick McCurry to the office; and the defendant was convicted before this Magistrate of the offence in question.

[The learned Judge here set out the objections taken to the conviction and continued.]

I am clearly of opinion that these objections should not prevail, and that the conviction should stand. The effect of the three Acts concisely stated is, that the Canada Temperance Act being in force in the whole county of Simcoe, including the township of Humphrey, the stipendiary magistrate of Parry Sound may try any offence against its provisions committed in that township, because that township, although within the county of Simcoe for municipal purposes, is nevertheless also within the territory in which the stipendiary magistrate of Parry Sound has jurisdiction.

FALCONBRIDGE, J., being engaged at the Assizes took no part in the judgment.

Order discharged, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA v TRIGANZIE.

Criminal law—Case reserved—Previous conviction when evidence of can be given—Indictment—Illegal statement of conviction in—Conviction quashed—R. S. C. ch. 174, secs. 139, 207, 230; ch. 164, secs. 6, 19, 23, sub-sec. 2, secs. 44, 84; ch. 167, secs. 13, 21; ch. 168, secs. 24, 25, 45; ch. 181, sec. 25.

An indictment for an assault occasioning actual bodily harm contained a second count charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after a previous conviction for felony, &c., additional punishment might be imposed. The first part of the indictment, only, was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner in his defence gave evidence of good character. The Crown gave some general evidence in rebuttal, and then tendered under sec. 26 of ch. 29, 32-33 Vic., a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction.

Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation: evidence of a prior conviction going to the matter of punishment, and not to general character.

Regina v. Rowton, 10 Cox C. C. 25, followed.

CASE reserved by the General Sessions of the Peace for the county of Hastings for the consideration of the Queen's Bench Division of the High Court of Justice.

At the said Sessions held at Belleville one Henry Triganzie was tried on an indictment charging:

1. That the said Henry Triganzie, at the township of Sidney, in the county of Hastings, on 9th May, 1887, in and upon one Thomas Manley Farley did make an assault, and him the said Thomas Manley Farley did then beat, wound, and illtreat, thereby then occasioning to the said Thomas Manley Farley actual bodily harm, and other wrong to the said Thomas Manley Farley then did, to the great damage of the said Thomas Manley Farley, against, &c.

2. That the said Henry Triganzie, at the Court of Oyer and Terminer and General Goal Delivery, holden at Belleville aforesaid, commencing on 22nd October, 1879, was convicted of unlawfully wounding one Abel H. Gilbert, being

an indictable offence, and was sentenced by the then presiding Judge to three months imprisonment for the said offence, and to pay the sum of five dollars in addition as a fine, which conviction and sentence had not been reversed.

The counsel for the Crown in arraiging the prisoner read to him only the first part of the indictment charging him with having committed the offence against Thomas Manley Farley, and made no allusion to the second part charging a prior conviction.

The prisoner in his defence gave evidence of good character.

The Crown gave some general evidence in rebuttal and then tendered, under 32-33 Vic. ch. 29, sec. 26 (D.), a certificate to prove a previous conviction, and read the second clause or count of the indictment charging a previous conviction. This certificate was as follows :

Canada, Province of Ontario, to wit :

Office of the Registrar of the High Court of Justice,
Queen's Bench Division for Ontario, Toronto, Thursday,
the 16th day of June, A.D. 1887.

These are to certify that a session of Oyer, Terminer, and General Gaol Delivery holden at the city of Belleville, in and for the county of Hastings, on the twentieth day of October and subsequent days, in the year of our Lord one thousand eight hundred and seventy-nine, one Henry Triganzie was before the Honorable Mr. Justice Patterson, one of the Judges of the Court of Appeal, assigned to hold said session, convicted, for that he the said Henry Triganzie did, on the first day of August, in the year of our Lord one thousand eight hundred and seventy-nine, at the township of Sidney, in the county of Hastings, one Abel Reynolds Gilmour unlawfully wound.

Upon which conviction judgment passed against the said Henry Triganzie, and he was thereupon sentenced to be imprisoned three months in the gaol, and to pay a fine of five dollars for the same, and which said conviction, judgment and sentence still remain in full force, virtue, and effect, in no wise reversed, annulled and made void.

All and singular which premises I the undersigned James Strachan Cartwright, Registrar of the High Court of Justice, Queen's Bench Division, having the custody of the

Records of the Court at which said conviction, judgment, and sentence passed against the said convict, do hereby certify under my hand the day and year first above written, according to the form of statute in such case made and provided.

(Signed) JAMES S. CARTWRIGHT,
Registrar, Q. B. D.

The prisoner's counsel objected to the reception of this certificate being received :

1. That it was not sufficiently authenticated to prove itself, no evidence being offered but its mere production.

2. That it was not proper evidence in rebuttal as to character, and

3. That it was not a case in which evidence of a previous conviction could be put in.

The learned chairman of the Sessions overruled the objections and allowed the certificate to be read and to be submitted to the jury, and the Crown called a witness to prove the identity of the prisoner with the Henry Triganzie therein named.

The learned chairman stated in his certificate that the previous conviction might have influenced the jury in arriving at the conclusion that the prisoner was guilty of the subsequent offence for which he was then being tried, although there was sufficient evidence to support the verdict without it.

The questions reserved for the Court were : 1. Did the said certificate prove itself, the prisoner's identity being proven ? 2. Was the evidence of such a previous conviction admissible under the circumstances, as evidence against the prisoner ?

If either of these questions should be answered in the negative, did it vitiate the verdict ?

Another question reserved for consideration was, the verdict returned by the jury being a general one "of guilty," did that necessarily mean that the prisoner was found guilty of the subsequent offence charged of having assaulted the said Thomas Manly Farley, and committed greivous bodily

harm upon him ; and did the fact of the verdict being general vitiate it ?

If the Court should be of the opinion that the said verdict was vitiated upon any of the grounds stated, then the conviction was to be quashed, otherwise to stand.

December, 6, 1887, *E. F. B. Johnston* appeared for the Crown.

Dickson, Q.C., contra.

February 6, 1888. ARMOUR, C. J.—The Imperial Act 7 & 8 Geo. IV., ch. 28, sec. 11, provided that any person convicted of any felony not punishable with death, committed after a previous conviction for felony, was liable on that account to a more exemplary punishment, and that in the indictment for such subsequent felony it should be sufficient to state that the offender was, at a certain time and place, convicted of felony, without otherwise describing the previous felony. And this was the first provision made by law for awarding a more exemplary punishment to persons convicted of felony after a previous conviction for felony.

This provision of 7 & 8 Geo. IV., ch. 28, sec. 11, was introduced into this Province, and became 4 & 5 Vic., ch. 24, sec. 30. See also 12 Vic., ch. 20, sec. 1 ; 16 Vic. ch. 158, sec. 13 ; 20 Vic., ch. 30, secs. 1 & 4 ; 27-28 Vic., ch. 19, sec. 10.

The Imperial Act 6 & 7 Wm. 4th, ch. 111, was then passed, which, after reciting the Act 7 & 8 Geo. IV., ch. 28, and that since the passing thereof the practice had been, on the trial of any person for any subsequent felony, to charge the jury to inquire at the same time concerning such previous conviction, and that doubts might be reasonably entertained whether such practice was consistent with a fair and impartial inquiry as regarded the matter of such subsequent felony, provided that it should not be lawful in such case to charge the jury to inquire concerning such previous conviction until after they had enquired

concerning such subsequent felony, and had found such person guilty thereof, and that the reading of the statement in the indictment of such previous conviction should be deferred until after such finding. But it was thereby also provided that if, upon the trial of any person for any such subsequent felony, such person should give evidence of his or her good character, it should be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty should have been returned, and that the jury should enquire concerning such previous conviction for felony at the same time that they enquired concerning the subsequent felony.

The provisions of this Act did not go far enough to prevent the person charged with the subsequent felony from being prejudiced by having a previous conviction stated in the indictment, because he was arraigned upon the whole indictment, and upon his arraignment the jury that were to try him might be in Court and hear him so arraigned, and to obviate the danger of their being thereby prejudiced against him the Act 24 & 25 Vic. ch. 96, sec. 116, provided that he should be first arraigned for the subsequent felony only, and contained the same provision as to giving the previous conviction in evidence in case the person charged with the subsequent felony gave evidence of his or her good character.

The Imperial Acts 24 & 25 Vic. ch. 96, sec. 116, and ch. 99, sec. 37, were the foundation of the provision in the Dominion Act 32-33 Vic. ch. 29, sec. 26, up to the passing of which there was no provision of the law in this Province analogous to the provisions of 6 & 7 Wm. IV., ch. 111, and 24 & 25 Vic. ch. 96, sec. 116, and ch. 99, sec. 37.

The Dominion Act 32-33 Vic. ch. 29, sec. 26, appears in the R. S. C. ch. 174, secs. 139, 207, and 230, and by these provisions it is only in the case of an indictment for any indictable offence committed after a previous conviction or convictions, for any felony, misdemeanour, or offence or offences punishable upon summary conviction, and for

which a greater punishment may be inflicted on that account, that the fact of a previous conviction can be stated.

What the offences are for which a greater punishment may be inflicted on account of the previous conviction of a person guilty of them, may be seen by reference to R. S. C. ch. 181, sec. 25 ; ch. 164, secs. 6, 19, 23, sub-sec. 2, secs. 44, 84 ; ch. 167, secs. 13, 21 ; ch. 168, secs. 24, 25, 45.

The offence charged in the indictment in this case was not one for which a greater punishment might be inflicted on account of the person charged having been previously convicted, and the fact of such previous conviction was therefore unlawfully stated in the indictment, and for this illegality the indictment might have been quashed before plea, and might still be quashed upon error brought: *Regina v. Fox*, 10 Cox C. C. 502.

The previous conviction having been illegally stated in the indictment did not give the prosecutor the right to prove such previous conviction in answer to evidence of good character given on behalf of the person charged, and unless a previous conviction could at the common law have been proved in answer to evidence of good character given on behalf of the person charged the proof of the previous conviction in this case was illegal.

It seems that at the common law such proof could not be given in answer to evidence of good character given on behalf of the person charged.

In *Regina v. Rowton*, 10 Cox C. C. 25, Cockburn, C. J., in delivering the judgment of the Court of Criminal Appeal, laid down the rule as to the kind of evidence of good character that may be given in favor of a person charged in this wise : " In the first instance it becomes necessary to consider what is the meaning of evidence to character. It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does that mean ? Does it mean evidence as to his reputation amongst those to whom his conduct and position is known, or does it mean evidence of disposition ? I think it means evidence

of reputation only * * The way and the only way the law allows of your getting at the disposition and tendency of his mind is by evidence of general character founded upon the knowledge of those who know anything about him and of his general conduct * * But when we come to consider the question of what, in the strict interpretation of the law, is the limit of such evidence I must say in my judgment it must be restrained to this, the evidence must be of the man's general reputation, and not the individual opinion of the witnesses * * I take my stand on this.

I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of reputation : that evidence of particular facts, although they might go far more strongly than the evidence of general reputation to establish that the disposition and tendency of the man's mind was such as to render him incapable of the act with which he stands charged, must be put out of consideration altogether. * * He also thus laid down the rule as to rebutting evidence to evidence of character. " Now, then, if that be the true doctrine on the subject of the admissibility of evidence to character in favour of the prisoner, the next question that presents itself is, within what limits must the rebutting evidence be confined which is adduced to meet that evidence which the prisoner brought forward? Now I think that evidence must be of the same character, and kept within the same limits : that while you can give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, showing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's general reputation was bad."

One would have thought that if evidence of good character were given in favour of a person charged with an offence to show that he was incapable of committing such an offence, proof of his previous conviction for a precisely

similar offence would be admissible in rebuttal; but such is the mercy of the law that it is not.

The conviction must therefore be quashed.

FALCONBRIDGE and STREET, JJ., concurred.

Conviction quashed.

[CHANCERY DIVISION.]

SIMMONS V. SHIPMAN.

Limitation of actions—Title by possession—Successive occupants—Absence of mesne conveyances.

The fact of there being no conveyances between successive occupants of land does not prevent a possessory title being acquired by virtue of their combined periods of possession, provided the possession has been of a continuous character against the true owner, and provided that the successive occupants claimed under each other in some sufficient way as in this case by virtue of a sale for value.

The Statute of Limitations speaks of possession without reference to conveyances.

THIS was an action brought by Eason Lewis Simmons against Charles Shipman for possession of certain lands and mesne profits.

In his statement of claim he alleged that he was a farmer residing at the town of Rodman, in the county of Jefferson, in the State of New York: that the defendant was a farmer residing in the township of Lansdowne, in the county of Leeds and Province of Ontario: that he, the plaintiff, claimed title in fee simple to the lands in question [setting them out] by length of possession, in manner following: under one Charles Cross who was in sole, actual and exclusive possession and occupation from 1850 to 1855, who then sold to and let into possession one Harwood, who continued in the sole, actual, and exclusive possession and occupation thereof until May, 1859, when the said Harwood then sold to and let into possession one John Dano,

who continued in the sole, actual, and exclusive possession and occupation thereof until December 8th, 1860, when by an Indenture dated December 8th, 1860, he granted and conveyed in fee simple the said lands and premises to one George Simmons, who continued in the sole, actual, and exclusive possession thereof until the time of his death: that on January 3rd, 1876, being so in possession, the said George Simmons died intestate, leaving him surviving his widow Sarah Simmons, his mother, and certain brothers and sisters, his heirs-at-law, but no children: that after the death of George Simmons, Sarah Simmons, at the request of and by and with the consent of the said heirs-at-law, remained in possession of the lands till about September, 1879, when she delivered up full, actual, and absolute possession thereof to him, the plaintiff, who was the assignee of the said heirs-at-law, under various deeds specified in his said statement of claim: that when he took possession of the lands as aforesaid, he leased the same to the said John Dano for a term which expired prior to the commencement of this action, and while Dano was in possession as such tenant to him, the plaintiff, to wit, about September 15th, 1879, the defendant without his knowledge or permission unlawfully and by force expelled Dano and his family from the lands and dwelling house thereon, and had ever since kept them so expelled, as well as the plaintiff, notwithstanding the plaintiff's demands for possession; and the plaintiff claimed possession of the lands, and \$500 for mesne profits since the defendant's wrongful entry into possession, and the costs of action.

By his statement of defence, the defendant besides denying generally all the material allegations in the plaintiff's statement of claim, claimed the land under conveyance from the said Sarah Simmons, of June 27th, 1879, alleging that her possession from her husband's death to that date had been adverse to the heirs-at-law, and that since that date he had been in sole and exclusive possession; and that neither the plaintiff nor John Dano, had ever been in possession: and further set up that the plaintiff's claim was barred by

the Statute of Limitations, R. S. O. ch. 103, of which he claimed the benefit, and of subsequent Acts in amendment thereto, especially 42 Vict. ch. 16 (O.)

The action came on for trial at Brockville, on October 18th, 1887, before O'Connor, J., and a jury.

The facts proved appear, sufficiently for the purpose of this report, from the judgments of the Divisional Court.

After the plaintiff had given his evidence, the learned Judge at the trial stated, that his present impression was, that the plaintiff could not avail himself of any title acquired by Harwood, as the incipient title of Harwood could not pass without a deed, but he determined to take evidence for the defence. After this evidence had been given, he withdrew the action from the consideration of the jury, and ordered judgment to be entered for the defendant, with costs of action, upon the ground that, as a matter of law, the plaintiff was not to have the benefit of Harwood's time when there was no deed, so that the plaintiff only proved possession for sixteen years, while at that time twenty years' possession was requisite.

On December 9th the plaintiff moved by way of appeal before the Divisional Court.

McMichael, Q. C., and *W. H. Jones*, for the plaintiff. O'Connor J., ruled that there could be no connection between Harwood and Dano without a deed; but see *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Yem v. Edwards*, 1 DeG. and J. 598; *Dixon v. Gayfere*, 17 Beav. 421; *Doe d. Carter v. Barnard*, 13 Q. B. 945; *Kipp v. Incorporated Synod of the Diocese of Toronto*, 33 U. C. R. 220.

Britton, Q. C., for the defendant. The ruling of O'Connor J., was that the plaintiff could not tack to his possession the possession of previous wrong-doing occupants. The plaintiff in ejectment must recover on his own title. If land is to pass without a writing there must be a formal livery of seisin. As to the possession of Sarah Simmons after her husband's death, see *Johnson v. Oliver*, 3 O. R. 26.

DECEMBER 21st, 1887. BOYD, C.—Dano bought the land in question from Joseph Harwood in 1859, and paid him \$40 in cash therefor. Harwood had lived on the land and worked it for thirteen or fourteen years, and then sold out to Dano, and went off the land, and possession was forthwith taken by Dano, who remained on the place for about a year and a half, working it, and fencing a part that was unfenced, or was out of repair.

The point ruled on at the trial was, that there was a break in the continuity of possession, because there was no writing passed between Harwood and Dano with reference to this land. I cannot assent to this view of the law. To bar the true owner and give a possessory title under the statute, the fact of actual possession is the material thing, and this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other. As pointed out by the Lord Chancellor in *Burrows v. McCreight*, 1 J. & Lat., at p. 303: "It is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances." In this case the possession of Dano was not independent of, but was derived from Harwood, the prior possessor. This satisfies the language used in *Dixon v. Gayfere*, 17 Beav. 44, and *McConaghy v. Denmark*, 4 S. C. R. 609. There was the actual transmutation of possession in virtue of a bargain for value between the parties, which would be sufficient to enable the Court to decree specific performance, though there was no writing. This same matter has frequently been considered in the States, and with the same result as that which I favour: *Weber v. Anderson*, 73 Ill. 439, where many of the cases are collected. See also *Doe d. Vincent v. Murray*, 2 Pugsley 376.

The judgment should be set aside with costs in any event to the plaintiff in the cause, and the action sent back for trial.

PROUDFOOT, J.—I think it is established that Harwood went into possession of the land in question not later

than 1848, and he cleared and cultivated in such a manner as to acquire a title by length of occupation.

It is also proved that he sold his right to John Dano for a valuable consideration in 1859.

At the trial the learned Judge held that no deed having been given by Harwood to Dano, that Harwood's possession could not be made use of to form part of the title of the plaintiff; and, being quite clear as to the law on the point, he withdrew the case from the jury, and entered a verdict for the defendant.

I am unable to agree with the learned Judge that any deed was necessary to transfer the equitable title to Dano. There is no doubt that a possessory title, that might by the lapse of time become perfected under the statute, may be the subject of sale or devise: *Asher v. Whitlock*, L. R. 1 Q. B. 1. And upon the sale to Dano, Harwood gave up the possession, and Dano took it. Dano then had a right to call for a legal transfer, and might have obtained it by a suit for specific performance. His equitable title was perfect. And it has been decided in *Thorne v. Williams*, 13 O. R. 577, that an action for recovery of land may be brought upon an equitable title.

The judgment for the defendant must be set aside and a new trial had. The costs to be costs in the cause to the plaintiff in any event.

FERGUSON, J.—The action is for the possession of land. The plaintiff seems to have set up title by length of possession by himself, and those through whom he claimed. There is no doubt a plaintiff may do this, although the defendant may have been in possession of the land for several years next before the commencement of the action. The statute, by expressly extinguishing the title of the party out of possession, gives a clear title to him who has been in possession by himself, or those through whom he claims for the prescribed period. The learned Judge withdrew the case from the consideration of the jury, and decided against the plaintiff's contention, resting his judg-

ment upon a single point. If his opinion upon this point was not the right one, there must be a new trial, for there were presented issues of fact which, if the ruling of the Judge was not right, should be determined by the jury. This point ruled on by the learned Judge was, that there was a break in the possession relied on by the plaintiff because there was no deed or writing from Harwood, who had for many years been in possession, and who sold to Dano for a valuable consideration, which was paid by Dano, who went into possession forthwith upon making his purchase, and continued for some time in possession and enjoyment and making improvements upon the property, thus holding, as I understand, that whenever in an action for the possession of land, the plaintiff seeks to show a title by length of possession by himself or those through whom he claims, he must, in order to succeed, be able to show a deed or writing from each former occupant or possessor to the occupant or possessor next succeeding him, or inevitably fail in his action. In this, I think, the learned Judge went too far. It is true, I think, that when the plaintiff seeks to make out his title in this way, he must show that there was a continuous occupation of the land (or its equivalent by the receipt of rents, &c.) against the true owner; and that each successive occupant claimed from or under the next prior occupant; but I do not think that it is now necessary that a deed or writing be shewn in every instance. That Dano purchased from Harwood—paid the consideration—went immediately into possession pursuant to his purchase, and continued there making improvements, is beyond doubt, and is not disputed. It was not disputed at the time of the decision at the trial. There was such a part performance of the contract of purchase and sale, that a suit in equity could be sustained upon it against an answer setting up the Statute of Frauds; and as a plaintiff in an action for the possession of lands, may now succeed upon showing a good equitable title, I think this was sufficient for the plaintiff, so far as this immediate point was concerned, and

this is the only matter or question that need be decided here.

For these reasons, I agree in the judgment that has just been delivered.

A. H. F. L.

[CHANCERY DIVISION.]

IN THE MATTER OF THE UNION RANCH COMPANY OF
CANADA (LIMITED.)

Winding-up Act—Creditors—Locus standi of shareholders—R. S. C. ch. 129.

On a petition by certain shareholders of the above company praying for a winding-up order under R. S. C. ch. 129.

Held, that R. S. C. ch. 129, like the Insolvent Act of 1875, which provided for the winding-up of incorporated companies, is intended to be put into operation at the instance of creditors only.

THIS was a petition by certain shareholders of the Union Ranch Company of Canada on behalf of themselves and all other shareholders thereof, praying for a declaration that the company was a trading corporation within the Winding-up Act, R. S. C. c. 129, and liable to be wound up thereunder, and for a winding-up order.

The petition came on for argument on February 29th, 1888, before Boyd, C.

Dr. Snelling, for the petitioners.

Bain, Q.C., and *Macgregor*, for the company.

March 1st, 1888. BOYD, C.—I think that the Winding-up Act, R. S. C. c. 129, like the Insolvent Act of 1875, which provided for the winding-up of incorporated companies, (see sec. 147, &c.) was intended to be put into operation at the instance of *creditors* only. The statutes are *in pari materia*, and are intended to provide for cases of compulsory liquidation at the instance of creditors. The distinction between this Act of the Dominion and

that of the Province, c. 181, (R. S. O., 1887,) is very marked. Sec. 5 of the Ontario Act provides for the winding-up order being made on the application of a contributory. Sec. 8 of this Act, R. S. C. ch. 129, empowers a creditor to make the application, and except this there is no other provision for initiating proceedings under the Act. It is true shareholders are referred to in secs. 3 and 14, but that reference is confined to cases where a company, being in liquidation, or in process of being wound up, a shareholder, &c., may on petition seek to have the proceedings brought within and continued under the provisions of "the Winding-up Act." Such is not the present case. Sec. 98 also reflects back light on sec. 8, both relating to insolvent banks by sec. 4, which makes it in terms imperative that only a creditor can petition in the case of a bank. But no distinction is intended by the Act as between banks and other insolvent corporations, except that in the case of banks the creditor must be one for not less than \$1,000. I observe that Mr. Justice Thompson has already expressed his opinion, that the only proper practice in order to initiate proceedings under this Act is upon the petition of a creditor. See *Re Steel Co.*, 5 Russ. & Geld. 55.

The preliminary objection appears to be fundamental and incurable, and I have no alternative but to dismiss the petition, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE THE CENTRAL BANK OF CANADA.

Winding-up Act—R. S. C. ch. 129—Liquidators, appointment of—Shareholders and creditors nominees—Interested liquidators—Compensation.

Under secs. 98 and 99 of the Winding-up Act, R. S. C. ch. 129, meetings of shareholders and creditors, respectively, of a bank, were held, at which the shareholders recommended the appointment of C. G. and S. as liquidators, and the creditors C. G. and H. On the application to the Court for the appointment of three liquidators it appeared that resort to the double liability of shareholders would be necessary to satisfy the claims of creditors under R. S. C. ch. 120, sec. 70.

Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, should be adopted.

Preference should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons.

The intention of sec. 38 of the Winding-up Act is that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them.

THIS was an application to the Court for an order appointing liquidators under the Winding-up Act, R. S. C. ch. 129.

Two meetings had been held, one of the shareholders and one of the creditors of the Central Bank of Canada, in respect to which bank a winding-up order had been made.

The report of the shareholders' meeting had recommended the appointment of Messrs. Archibald Campbell, T. S. Stayner, and William Gooderham as liquidators.

The report of the creditors' meeting had recommended the appointment of Messrs. Archibald Campbell, William Gooderham, and William H. Howland as liquidators.

The question as to which three liquidators were to be appointed came up before the Court on December 16th, 1887, and was argued before Boyd, C.

Bain, Q.C., for the petitioning creditor. The creditors are the parties who are chiefly interested in the proceedings

and in the bank assets, as it is admitted it will be necessary to resort to the double liability of the shareholders under the provisions of the Banking Act, R. S. C. c. 120, s. 70. The views of the creditors should therefore be adopted: *Buckley on the Companies Acts*, 4th ed., s. 92, p. 238; *In re Association of Land Financiers*, 10 Ch. D. 269.

Robinson, Q.C., and S. H. Blake, Q.C., for the bank. Mr. Gooderham is a large shareholder. Mr. Howland represents an institution which is a creditor. Mr. Stayner is both a creditor and shareholder, and his name was not brought forward at the shareholders' meeting, or he might have been recommended. Mr. Howland is neither a shareholder nor a creditor. Messrs. Gooderham and Stayner offer their services free of cost, which would necessitate the employment of only one paid liquidator and so save the expense of two of them—quite a consideration in a case like this. The shareholders recommendation should prevail.

Bain, Q.C., in reply.

December 16, 1887. *BOYD, C.*—The provisions of the Winding-up Act, secs. 8 to 96, are in the case of this bank subject to the provisions contained in secs. 97 to 104 inclusive. (See R.S.C. ch. 129, sec. 4.) The shareholders' meeting, under sec. 99, has unanimously nominated as liquidators Messrs. Campbell, Gooderham and Stayner: the creditors' meeting has unanimously nominated Messrs. Campbell, Gooderham and Howland. It is not denied that it will be necessary to resort to the double liability of shareholders to satisfy the claims of creditors. It appears to be the special desire of the creditors that of their nominees Mr. Howland, at least, should be one of the liquidators, and that if only one had to be named, he would have been their choice. I think the petitioner is correct in his reading of the Act that only three liquidators can be appointed by the Court—in fact neither more nor less than three. (Secs. 101, 102.)

It is urged on the part of the shareholders that two of their nominees, Messrs. Gooderham and Stayner are

willing to act without remuneration. While this consideration has some weight, I do not think that is sufficient to turn the scale against the creditors' nominees. It may be if the scheme of the shareholders, as formulated in the resolution laid before me, were practicable and were carried (*i.e.*, that Mr. Campbell should be the active officer and the others be an advisory board), that there would be no great saving, as compared with the amount of compensation when all three were active equally or in different degrees. Sec. 28 intends that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services under the Act is usually a percentage, to be based chiefly upon consideration of the time occupied, the work done, the responsibility imposed, and being fixed, it will go to the liquidator, or if more than one, it will be distributed amongst them.

As between Mr. Howland and Mr. Stayner, preference should, in the circumstances of this case, be given to the former, because he is neither creditor nor shareholder. Mr. Stayner is both, and is thus at a disadvantage.

The general rule was laid down by the Lords Justices (Knight-Bruce, and Turner,) *In re the Northumberland, &c., Banking Co.*, 2 DeG. & J. 508, that it is desirable that liquidators should all be disinterested persons, and for this reason neither creditors nor shareholders should be appointed. Where several are to be appointed, and opposition is being made, as here, the Court will endeavour to secure an independent majority, and in this case Mr. Campbell and Mr. Howland will fulfil that requirement. All agree on the appointment of Mr. Gooderham, and while he is a shareholder, it must not be understood that any bias is hinted at either in his case or in that of Mr. Stayner. But there must be a means of deciding between the nominees of competing creditors and shareholders, and the test supplied by the English Judges is sound in principle and applicable to this contest. The choice of the creditors therefore, they having the chief and immediate concern in realizing the assets, will be adopted by the Court.

I am not now in a position to give any directions under sec. 23 of the Act. Speaking, generally, it is not proper for one liquidator to delegate duties or powers to another. They should act in conjunction, and give their constituents the benefit of their joint judgment and discretion, in all matters pertaining to their office. If any exigency arises, or if it is found not practicable to act in conjunction, the Court may exercise its jurisdiction under this section.

Security should be given by each liquidator forthwith to the extent of \$20,000 each, to the satisfaction of the Registrar. All moneys received by the liquidators are to be paid into the Bank of Commerce (as the custodian of Court funds) pursuant to the provisions of secs. 35 and 36 of the Winding-up Act.

The accounts of the liquidators to be passed half yearly before the Master in Ordinary.

It will be referred to the Taxing Master to tax the costs of the petitioner and bank properly incurred up to this time to be paid out of the assets.

G. A. B.

[CHANCERY DIVISION.]

MCLEAN V. BROWN.

Sale of goods—Material condition in contract—Refusal to accept—Action for deposit and damages.

The plaintiff purchased a quantity of lambs from the defendant to be consigned to plaintiff's firm at Buffalo, which condition plaintiff stated he inserted in the contract "to help our business, * * and to help build the firm up," the firm being a new one. Defendant disregarded this condition and shipped the lambs to another name, and plaintiff refused to accept delivery. In an action for the deposit paid at the time of the contract and for damages, it was

Held, (affirming Rose, J.,) that the term of the bargain as to the manner of consignment was a material part of it; material to the plaintiff as the defendant well knew, and following *Bowes v. Shand*, L. R. 2 App. Cas. 455, that the plaintiff must succeed.

Norrington v. Wright, 115 U. S. Rep. 188, specially referred to.

THIS was an appeal from the judgment of Rose, J., in an action brought by William McLean against Alexander Brown for \$570 deposit paid, and \$100 damages for breach of contract.

The action was tried at Goderich on October 26th, 1887.

J. T. Garrow, Q.C., and *Proudfoot*, for the plaintiff.

Osler, Q.C., and *McPherson*, for the defendant.

The evidence shewed a contract in writing between the plaintiff and defendant for a sale of seven double deck loads of lambs to be consigned to McLean, Burroughs & McLean at Buffalo, which contract had been lost, and the findings on the evidence, as well as the other material facts appear in the judgment of the learned Judge who tried the action.

November 24, 1887 ROSE, J.—I find that it was agreed between the parties that the lambs should be consigned to the firm of McLean, Burroughs & McLean at Buffalo, and that such term was, on the facts of this case, a material term of the contract.

The plaintiff had just established his firm in Buffalo, and it was an object to have consignments in their own name, as it would shew to others that the consignors had con-

fidence in their business integrity and financial ability; and I further find that the materiality was known to the defendant at the time he made the contract. See his own evidence on cross-examination, and the evidence of the plaintiff and Mathieson.

When, therefore, the defendant arrived in Buffalo with the lambs not consigned according to contract, I do not think the plaintiff was bound to accept them.

I also find that under the terms of the contract the defendant was not entitled to ship to the plaintiff more than two car loads on the 1st of January; and this without reference to whether the contract named the 1st of January, as contended by the defendant, or stated "from the 1st to the 20th," as claimed by the plaintiff.

Therefore, when he shipped the three car loads as he did, he was tendering more than in any event the plaintiff was bound to receive. This was the more material in view of the correspondence between them prior to the shipment. I have not noted that the plaintiff's brother distinctly raised this objection when the lambs arrived in Buffalo. The plaintiff was not then present, but when Jas. McLean telegraphed to the plaintiff that "three double decks had arrived in Buffalo on Sunday, 2nd January, not to our firm," he received immediate instructions from the plaintiff to demand back the money, *i. e.*, \$510, and \$100 damages.

The action of the defendant in handing over the three loads to Mathieson, and subsequently consigning to him the remaining two car loads, affords evidence coupled with the other evidence of an intention to be no longer bound by the contract. See *Midland R. W. Co. v. Ontario Rolling Mills*, 10 A. R., p. 677.

I think there must be judgment for the plaintiff for \$510, and costs of suit.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on February 22, 1888, before Boyd, C., and Ferguson, J.

McCarthy, Q.C., for the appeal. The question is, Was the plaintiff entitled to refuse to accept the lambs? The manner of consignment was not a material variation. The defendant had to ship, pay freight, pass the customs, and pay duties; and the best way to do that was to consign as he did. The plaintiff says he desired the new firm of McLean,

Borroughs & McLean to obtain standing and credit by means of the consignments, but the seller had a lien for the balance of the purchase money, and should retain control of the consignment and shipping bill. The trial Judge has found, as a matter of fact, that the condition was a material one, but it is more a matter of law. What is a material condition? It is a condition precedent, or such a one that if broken a right to damages would accrue. The plaintiff has the right if it is a condition precedent, but has no such right if the condition does not go to the essence of the contract. *Bettini v. Gye*, 1 Q. B. D. 183. When a covenant goes to part only of a contract, and may be compensated in damages, it is an independent contract. I refer to *Graves v. Legge*, 9 Ex. 709; *MacAndrew v. Chapple*, L. R. 1 C. P. 643; *Seeger v. Duthie*, 8 C. B. N. S. 45; *Dyment v. Thomson*, 12 A. R. 659. The evidence shews the number shipped was right, as there was a different method of measurement in the United States from Canada. Even if too many were delivered at once, that could be compensated for in damages, and did not invalidate the contract. The contract was to be performed in instalments, and the breach of one instalment would not invalidate the whole. After the plaintiff's conduct the defendant could treat the contract as terminated, and is entitled to damages on the whole of it. See *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434; *Midland R. W. Co. v. Ontario Rolling Mills*, 10 A. R. 677.

Aylesworth, contra. The manner of shipment was settled by the parties. The lambs were to be consigned to the firm of McLean, Burroughs & McLean. That was definite and material. The evidence shews he would not have bought if the consignments could not be made to the firm, and he told the defendant so, and gave him the reason "that it would help the new firm." This action is for money had on a failure of consideration. The non-compliance with the term of shipment was material, and the plaintiff was entitled to refuse to accept the lambs. I refer to *Cross v. Eglin*, 2 B. & Ad. 106; *Cunliffe v. Harrison*, 6

Ex. 903 ; *Hart v. Mills*, 15 M. & W. 85 ; *Goodyear Rubber Co. v. Foster*, 1 O. R. 242. As to an instalment contract see *Honck v. Muller*, 7 Q. B. D. 92. Defendant refused to perform the contract, so plaintiff was entitled to refuse to accept.

McCarthy, Q.C., in reply. Was the term a condition precedent, or a warranty : *Chanter v. Hopkins*, 4 M. & W. 399. See also *Frost v. Knight*, L. R. 7 Ex. 111 ; *Campbell's Sale of Goods*, 275, 276, 282.

March 1, 1888. BOYD, C.—An examination of authorities has strengthened the opinion I had formed at the close of the argument, that this judgment should be affirmed. The parties have put their contract into writing, and though the paper is lost, there is no doubt as to the exact nature of its contents. It was a matter of distinct stipulation that the lambs to be bought by the plaintiff were to be shipped by the defendant from St. Mary's, and consigned to Messrs. McLean, Burroughs & McLean of Buffalo, of which firm the plaintiff was a member. This provision of the contract was entirely disregarded by the defendant, and for it was substituted a plan by which the lambs were brought to Buffalo by the owner, in company with the defendant.

The plaintiff refused to complete the contract, and purchase the lambs, on the ground that they had not been consigned to the firm of which he was a member. The term of the bargain as to the manner of consignment was a material part of it—material to the plaintiff as the defendant well knew. It was the subject of conversation at the time of the making of the contract, and the defendant was told that the plaintiff would not agree to purchase unless the consignment was made as he designated. The reason for this requirement was also given to the defendant. The plaintiff says : " I gave him a reason, because we were a new firm starting there, and it would help our business. * * I was through Canada every week, and consigning stuff to the firm every week to help to build the firm up."

But after all, the important matter according to modern law is this term is found expressed in the contract. As said by Cairns, L. C., in *Bowes v. Shand*, 2 App. Cas. 463: "It does not appear to me to be a question for your Lordship, or for any Court, to consider whether that is a contract which has upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." Again he uses this language: "The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract * * ; but that is no reason why a term which is found in a contract should not be fulfilled:" p. 465.

To the same effect is the language of Lord Hatherly: "If the purchaser finds that the bargain which is attempted to be enforced as against him, is not only burdensome upon him, but is against the letter of his contract, there is nothing in our law which prevents his availing himself of that answer, * * namely, that he has not entered into the engagement you allege, and if you seek to fasten upon him the engagement, you must first bring him within the four corners of the contract," p. 476. So again, Lord Gordon: "The terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them, and we may rely upon this, that they have considered well the terms of the contract before they entered into it. What your Lordships are proposing to do is to adhere to the words of the contract," p. 485. "The safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves," p. 486.

The highest Courts in England and America are at one upon the question with which we are now dealing. In 1885 the law of sale in this regard was passed upon by the Supreme Court of the United States in *Norrington v. Wright*,

115 U. S. Rep. 188, and the general rule was thus formulated: "In a mercantile contract, a statement descriptive of the subject matter, or of some material incident, such as the time and place of shipment, is ordinarily to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which, the party aggrieved may repudiate the whole contract."

In *Cunningham v. Judson*, 30 Hun. 63 (1883), it was held that an agreement for the shipment of iron from Great Britain to New York, will not be fulfilled by the purchase of iron of the kind and quality prescribed in New York, and tendering it at the appointed time. This was put on the ground (recognized by the Lords in *Bowes v. Shand*) that the purchaser had a right to insist on the contract as it was made, and that the Court had no power to make a different contract for the parties, even though it may appear to be equally beneficial to the party who objects to the change. See also *Behn v. Burness*, 3 B. & S. 755, 757.

The judgment should be affirmed, with costs.

FERGUSON, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

WEST ET AL. V. PARKDALE ET AL.

Damages—Measure of—Evidence—Injury to land—Injury to business—Prospective value of land.

The defendants having built a subway in front of the plaintiffs' property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, under the circumstances set out in 7 O. R. 270 ; 8 O. R. 59 : 12 A. R. 393 ; 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an Official Referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference, the Referee ruled, (1) that the measure of damages was the difference in value of the property before and after the construction with interest added ; (2) that the prospective capabilities or value of the land could not be taken into account except so far as such elements entered into the computation of the then market value, or had regard to what would have been the present value of the property had the subway not been constructed ; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling, it was

Held, that the corporation were liable as wrong-doers, who were not protected from the consequences of their tort by any statutory provision, to make good all damages sustained, for which an action would lie for their unauthorized act, such damages being of a two-fold character, involving injury to the plaintiff's land and to their business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads.

Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value ; such evidence to be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and the potential value of the property.

THIS was an appeal from the certificate of Joseph Easton McDougall, Esquire, Q.C., an Official Referee, made in this suit brought by Richard West, and his wife, against the corporations of the village of Parkdale, and of the city of Toronto, for damages caused by the construction of a railway subway in front of the plaintiffs' property.

The facts in connection with the case are fully reported in 7 O. R. at p. 270, and in appeal at 12 A. R. 393, and the result of the appeal to the Privy Council is reported 12 App. Cas. 602.

By an order of Court it was referred to the said

Referee, to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, the Corporation of Parkdale, and to fix the compensation proper to be paid in respect thereof.

On the reference, the plaintiffs claimed damages not only for depreciation in the value of their property, which was affected, but for loss to their business as well.

On this contention being made, and before completing the taking of the evidence, at the request of counsel for all parties, the said Official Referee ruled as to the measure of damages, and embodied his rulings in the following certificate:—

“I certify that * * I have, after hearing part of the evidence in support of the plaintiffs’ case, considered certain preliminary questions as to the measure of damages, and I find as follows :

“1. That the true measure of the plaintiffs’ damages is the difference in the value of the plaintiffs’ properties immediately before the construction of the subway, and their value immediately after the construction of the same, with interest added from the date at which construction began.

“2. That the moment the subway was constructed the plaintiffs’ injury arose, and the tortious act of the defendants was once for all committed, and the injury was final and permanent in its character, and capable of final estimation ; and that I cannot take into account the prospective capabilities or value of the lands, except so far as such elements enter into the computation of the then market value, or have regard to what would have been the present value of the plaintiffs’ properties had the subway not been constructed.

“3. That the plaintiffs are not entitled to special damages by reason of increased difficulty of access to their property and consequent injury to their business, and that these circumstances are proper to be offered in evidence as shewing reasons why the value of their property is seriously affected, but for no other purpose.”

From this certificate the plaintiffs appealed on the grounds:

1. That the plaintiffs were entitled to give evidence as to the prospective capabilities of the said lands, and in placing a value on the said lands and arriving at the value thereof, such prospective capabilities should be taken into account, and regard must be had to the present value of the plaintiffs' properties had [the subway not been constructed and the damage caused by such construction allowed.

The decree in this action was based on tort, and all damages sustained should be allowed, and the finding that the plaintiffs were not entitled to special damages by reason of increased difficulty of access to the property and consequent injury to their business was wrong.

The appeal* came on for argument on February 11th, 1888, before Boyd, C.

Cassels, Q.C., and *H. Cassels*, for the plaintiffs. The Referee has treated the case as if it came under the provisions of the Railway Acts, and as if the measure of compensation provided in them were the correct one in this case, overlooking the fact that the defendants have been declared to have been wrongdoers, and not to have done the works complained of under the authority of the Railway Acts. He has refused to enquire as to the personal injury to the plaintiffs, that is, as to how their business is affected. The plaintiffs, road is stopped up, and they have to carry on business at a great disadvantage on account of their regular access being interfered with: *Fritz v. Hobson*, 14 Ch. D. 542, at p. 553. The Referee relies on *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. at p. 276. The lowering of the road is a *taking* of land within the Railway Acts, as it is an injuriously

*Although the appeal was had [in this action, there were other actions pending for damages caused by the construction of the same subway, which actions had also been referred to the same Official Referee.—REP.

affecting of the *locum in quo*. We also contend that in fixing the compensation regard should be had to the prospective capabilities of the land. Damages are to be assessed once for all, and we should get this as a substantial matter: *The Mayor, &c., of Montreal v. Brown*, 2 App. Cas. at p. 185.

Osler, Q.C., and *J. H. Macdonald*, Q.C., for the defendants. Damages are to be assessed once for all, and they relate to the time the damage was done: *Jones v. New Orleans, &c., R. W. Co.*, 14 Am. & Eng. R. Cas. at 223. No personal damages should be allowed. Injury to business is not a ground of compensation if plaintiffs get the difference between the market value at the different dates, but the detriment for freedom of access is an element of it. The injury to business is too remote: *Rickett v. The Directors, &c., of the Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *Mayne on Damages*, 4th ed. 41, 43 and 423; *The Corporation of the County of Welland v. The Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147, 31 U. C. R. 539; *The Chairman, &c., of the Metropolitan Board of Works v. Owen McCarthy*, L. R. 7 H. L. 243. There is no claim for loss to business in the pleadings. The defendants, the village of Parkdale, are in privity with the railway companies, and the Railway Acts should control the measure of the damages. The only mistake made was in a preliminary to the work. The railways should have given notice to the plaintiffs and paid compensation. They are only entitled to be placed in the position in which they would have been had the Act been complied with. It is only those who are covered by the Railway Act who get damages.

Cassels, Q.C., in reply. Plaintiffs say the highway is blocked up, and damages should be given for that as well as depreciation to the property. They are entitled to it as an element in the general depreciation, and they are also entitled to it in addition as a special damage. It is susceptible of discrimination: *Matter of State reservation at Niagara*, 16 Abbott N. C. N. Y. 198.

February 14, 1888. BOYD, C.—The measure of damages in this case is not limited to what might be recovered under the compensation clauses of the Railway or Municipal Acts. The corporation are liable as wrongdoers, who are not protected from the consequences of their tort by any statutory provision. The defendants are to make good to the plaintiff all damages sustained by him for which an action would lie against them in respect of their unauthorized act in lowering the highway in question.

These damages may be of a two-fold character, involving injury to the plaintiff's business and injury to his land—the former may be diminished in profitableness and the latter lowered in value. If in the evidence one injury can be discriminated from the other, it is competent for the plaintiff to recover under both heads of damage, and therefore I think the ruling of the Referee is erroneous, in which he restricts himself to an injury as to the diminution in the value of the property—by which I understand the land of the plaintiff is meant—as distinguished from the trade or business which is carried on upon that land.

In *West's* case there appears to be no doubt that he has sustained an actionable injury by the lowering of the street in front of his premises, by which he has sustained in his business a particular grievance beyond the rest of the public, and this irrespective altogether of the alleged permanent depreciation in the value of his land thereby injuriously affected. This ground of appeal should therefore be allowed, and the costs of it taxed in any event to the plaintiff.

Upon the other ground of appeal, I think evidence may be received of the present value of the property with a view of throwing some light on the prospective capabilities of the land at the date of the trespass, but not with a view of forming a basis for compensation on its present value. The evidence must be used so as to aid in fixing compensation for the detriment sustained by the plaintiff at the date of the perpetration of the wrong, having regard to the then present and the potential value of the

property. In addition to the cases cited, *Ripley v. Great Northern R. W. Co.*, L. R. 10 Ch. 435, merits consideration.

The counsel disagreed on the scope of the Referee's acts and ruling on this head, but so far as the appeal is concerned the objection made is that the Referee was bound to regard the present value of the property. This is too broad: the witness may regard it and speak of it as in some way aiding him in his evidence as to the prospective value, but the Referee is not bound to regard the present value in fixing the former value. This ground of appeal is overruled, with costs to be paid in any event by the plaintiffs.

As to the former ground of appeal, I decide simply upon West's case, whose business premises abutted on the street which was lowered. Other cases will depend on special facts, the general test being whether the matters in respect of which damage is sought are to be considered actionable wrongs or not.

As to the Davidson case: from the Referee's reference to it, I judge that the late decision of *Re Wadham and The North Eastern R. W. Co.*, 14 Q. B. D. 747, and affirmed 16 Q. B. D. 227, has an important bearing thereon. See also *Ford v. Metropolitan and Metropolitan District R. W. Cos.*, 17 Q. B. D. 12.

G. A. B.

[CHANCERY DIVISION.]

REINHART V. SHUTT.

Mechanics lien—Mortgage—Prior or subsequent incumbrancer—

The plaintiff worked on a barn belonging to the defendant up to August 9th, 1887, and did some further work on October 25th, following. The defendant mortgaged his land to A. S., by mortgage dated October 21st, and registered October 24th. Plaintiff registered his lien October 25th, and having brought his action against defendant only, obtained the usual judgment with a reference to the Master, who made A. S. a party to the suit in his office, and A. S. thereupon petitioned to have the Master's order set aside.

Held, following *McVean v. Tiffin*, 13 A. R. 1, that the mortgage was not a subsequent but a prior mortgage as regarded the plaintiff's lien, and that A. S. should not have been added as a party.

THIS was a petition filed by one Andrew Shutt asking to have an order of a Local Master, making him a party defendant, discharged.

The suit was brought by William Reinhart against John Shutt to enforce a mechanic's lien, and the usual judgment had been obtained for a lien against John Shutt, and referring it to the Local Master to enquire as to claimants, except prior mortgagees, if any, and to make them parties in his office. The Master had made the petitioner a party, and he had been served with the usual notice T.

The petition set out that the certificate of *lis pendens* in this suit was dated November 25th, 1887, and was registered the same day, and that the Master on January 16th following, had made an order adding the petitioner as a party to the suit in respect of a mortgage dated October 21st, 1887, and registered October 24th, 1887, and alleged that he was not a necessary party, and asked to have the order discharged.

The petition came on for argument on February 8th, 1888, before Boyd, C.

Field and *W. M. Douglas*, for the petitioner. The evidence shews that nearly all the work, which was build-

ing a barn, was done previous to August 9th, 1887, and that the plaintiff did about \$5 worth of work on October 25th: that there was no contract to erect the whole of the barn: that the plaintiff worked by the day, and could have been discharged at any time: that the petitioner advanced defendant \$600 on the mortgage, which was dated October 21st, and registered October 24th, one day before the lien was registered or the last day's work done. At the trial there was no question but that there was something due from the defendant to the plaintiff, and a judgment with a reference to ascertain the amount was consented to. If the mortgage was to be attacked, the mortgagee should have been made a party to the suit originally. There was no contract to complete the barn, and there may possibly be no lien existing, and the petitioner should have had an opportunity to shew that. He is a prior incumbrancer, and the Master should not have made him a party. See *Richards v. Chamberlain*, 25 Gr. 402; *Bank of Montreal v. Haffner*, 10 A. R. 592; *McVean v. Tiffin*, 13 A. R. 1. It is the registration that constitutes the lien, not the work. The petitioner is first in registration. Under sec. 4, sub-sec. 3, of the Mechanics Lien Act, the person entitled to the lien is to be deemed a purchaser *pro tanto* when the statement is registered. [BOYD, C.—There are a good many conflicting decisions on that.] Yes, but the later ones are in the petitioner's favour. Even if there was notice it would not avail the plaintiff, and notice is disputed. See *Hynes v. Smith*, 27 Gr. 150.

Shepley and E. O'Connor, contra. If the petitioner is a prior mortgagee he can dispute the lien, but if he is a subsequent mortgagee he is bound by the judgment. In *McVean v. Tiffin*, *supra*, the proceedings were to attack prior mortgagees, and that cannot be done by notice T in the Master's Office. The evidence shews that the petitioner is a subsequent mortgagee, and that he had notice of all the facts and circumstances before he took his mortgage.

Field in reply. Under *Neil v. Carroll*, 28 Gr. 30 & 339, the plaintiff is not entitled to a lien at all. His lien had

expired and he went and did a little work to revive it. He did not finish the barn—it is not finished yet.

February 14, 1888. BOYD, C.—It appears to me the Court of Appeal in *McVean v. Tiffin*, 13 A. R. 1, has placed upon the Mechanic's Lien Act a construction which binds me to decide in this case that the mortgage in question is not a subsequent but a prior mortgage as regards the plaintiff's lien. The mortgage is registered on the 24th October, and the lien on the following day, though in respect of work and services rendered some months before.

Osler, J. A., speaking apparently for the full Court, in 13 A. R., p. 4, said: "Although as between owner and contractor, the lien may * * exist from the time of the commencement of the work, yet if the latter desires to preserve his position and establish a priority over subsequent purchasers or mortgagees, he must register his lien."

This in effect affirms the decision in *Hynes v. Smith*, 27 Gr. 150, therein cited, and in effect overrules the decision of my brother Ferguson in *Makins v. Robinson*, 6 O. R. 1, not therein cited.

The Revised Statutes of Ontario, 1887, have the Mechanic's Lien Act re-arranged as ch. 126. The law as decided in *Hynes v. Smith*, seems to be recognized therein. The provisions of sec. 4, sub-sec. 3, and sec. 26 of the former R. S. O. 1877, are united in one section (sec. 19) but without any change of phraseology. In the 20th sec. provision is made as to the lien for thirty days' wages, and it is therein declared that such lien shall have the same priority for all purposes after as before registration. This implies that no priority is to be given to the unregistered lien in other cases under the Act, after it is duly registered, as against prior registrations.

There is also involved a modification of the interpretation, or rather of the application, of the term "owner," given in sec. 2, sub-sec. 3 (R. S. O. ch. 126, 1887.) By that section "owner" extends to all persons claiming under him who is the owner at the time of the initiation of the lien, whose rights are acquired after the work is commenced, &c.

In cases of registered title and unregistered lien, this must be limited to persons subsequently acquiring rights in the property by other than registered instruments. For, according to the decisions, the moment a subsequent purchaser or mortgagee registers his conveyance, he thereby cuts out the prior unregistered lien of a mechanic.

I decide nothing as to what the effect of notice may be on such a state of incumbrances, as it is not involved in my dealing with this petition, the prayer of which should be allowed. The Master should not have added this mortgagee as a party, and he is entitled to costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

COUSINEAU V. THE CITY OF LONDON FIRE INSURANCE
COMPANY.

*Insurance—Fire—Conditions of policy—Limitation of actions—Waiver—
Estoppel by conduct—Special case stated—Vacating—Amendment.*

The plaintiff sued upon an insurance policy for a loss occasioned by a fire, which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced till the 11th July, 1887. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to the 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did so procure and furnish, additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as required by one of the conditions in variation of the statutory conditions, which provided that the loss should not be payable until sixty days after the completion of the claim.

Held, per ARMOUR, C. J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble, and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action.

Per STREET, J., that in the absence of any agreement not to insist upon the condition, there could be no waiver unless the defendants had so acted as to estop themselves from taking advantage of the condition; there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and the defendants were, therefore, entitled to the benefit of it.

Cornish v. Abington, 4 H. & N. 548, and *Thomas v. Brown*, 1 Q. B. D. 714, discussed.

Held, also, per ARMOUR, C. J., that, except by consent, affidavits cannot be received to alter or modify a special case stated by consent; the only relief open to a party complaining that a case has been misstated, is to apply to amend or vacate it; and *quære*, whether it could be amended after judgment.

The two Judges who composed the Divisional Court at the hearing of this case disagreeing, a motion to set aside the judgment of the trial Judge in favour of the plaintiff was dismissed.

THE plaintiff sought to recover from the defendants, by virtue of a policy of insurance effected by the defendants on certain property of the plaintiff, the sum of \$1,250, which amount he alleged that he had lost by a fire, which consumed the insured property on the 28th March, 1886.

The case was tried by Robertson, J., at the Autumn Sittings, 1887, at Ottawa, upon the following admissions:

"(1) The defendants admit the statement of claim, and they rely only upon paragraph eleven of the statement of defence."

Paragraph eleven stated that the policy contained a condition that every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of the policy should be absolutely barred unless commenced within one year next after the loss or damage occurred: that this action was commenced after the expiration of a year from the time the loss and damage occurred; and that the defendants claimed the benefit of this condition as an effectual bar to the action.

"(2) The plaintiff admits that the policy contains the condition set out in the eleventh paragraph of the statement of defence, and that the action was commenced on the 11th July, 1887, and the loss and damage occurred upon the 28th March, 1886.

(3) The defendant admits the plaintiff's reply hereto annexed; the defendants' rejoinder is hereto annexed."

The reply stated that the condition mentioned in the eleventh paragraph of the defence was one of the conditions set forth in the Fire Insurance Policy Act: that the defendants inserted in their policy a condition in variation of the statutory conditions, as follows: "The loss shall not be payable until sixty days after the completion of the claim;" that after the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to the 11th May, 1887, requested the plaintiff to procure and furnish additional particulars concerning the claim, and the plaintiff from time to time procured and furnished the same, and the claim was completed more than sixty days prior to the commencement of this action, namely, on or about the 11th day of May, 1887.

The rejoinder stated that the variation referred to in the reply had no reference whatever to, and did not in any way affect or vary the condition set out in the eleventh paragraph of the defence, but was a variation of or agreement under the 17th statutory condition, and in no way affected any other condition of the policy.

"(4) The damages to be paid to the plaintiff without any deduction whatsoever are hereby assessed at the sum of \$550, and judgment is to be entered for that sum in case the plaintiff is held entitled to recover.

(5) It is hereby agreed that the action now pending between the parties hereto in the Common Pleas Division shall abide the result of this action, and judgment shall be entered accordingly therein.

(6) The costs of both actions shall abide the event of this action.

(7) The defendants admit the validity of the said variation set out in the reply as against themselves.

(8) It is agreed that this action shall be tried by the presiding Judge at the present Assizes at Ottawa, upon the pleadings and admissions and facts herein stated, and judgment be entered accordingly.

(9) The judgment is to have the same effect as regards the right of either party to appeal therefrom as if case tried by Judge and jury.

(10) All admissions herein made by both parties are for the purposes of this settlement only."

The learned Judge gave judgment for the plaintiff.

On the 14th February, 1888, *McCarthy*, Q. C., (*C. Millar* with him) moved to set aside the judgment and to enter it for the defendants upon the following among other grounds: (1) The judgment directed to be entered is wrong. (2) The judgment is contrary to the law and evidence and admissions in the case. (3) No waiver of the defence that the action was barred was pleaded or admitted, and none in fact existed. (4) The defendants did not admit that they demanded the particulars of the claim after one year next after the loss or damage occurred, and they did not do so. (5) In no way did the defendants prevent or delay the plaintiff in the commencement of this action. (6) The action was barred under the 22nd statutory condition, and the learned trial Judge should have so held; and upon other

grounds appearing in affidavits and papers filed. The defendants also moved for leave, if necessary, to read the affidavit of Fred. W. Hill, and the exhibits therein referred to. The affidavit of Hill stated that all the proofs of loss furnished by the plaintiff in this action, and a copy of all the demands made by the defendants' solicitors in reference to the same, and the replies thereto by the plaintiff's solicitor, were annexed in a bundle of papers marked as an exhibit.

C. R. W. Biggar, shewed cause.

March 9, 1888. ARMOUR, C. J.—It is impossible for us to receive affidavits, except by consent, altering or modifying a special case stated by consent and deliberately agreed upon by counsel.

The only relief open to a party complaining that a case has been misstated, is to apply to amend or to vacate it.

It may be doubted whether having been stated by consent, and judgment having been given upon it, it can now be amended, and whether the only relief that could be afforded would not be to vacate it, but that would only be done as an indulgence and upon payment of all the costs by the party complaining; *Doe v. Lewis*, 1 Burr. at p. 617; *Notman v. The Anchor Ass. Co.*, 6 C. B. N. S. 536; *Hills v. Hunt*, 15 C. B., at p. 30; *Barnaby v. Tassell*, L. R. 11 Eq. 363; *Re Taylor, Tomlin v. Underhay*, 22 Ch. D. 495.

The case admits that the fire took place on the 28th day of March, 1886, so that to prevent the operation of the 22nd statutory condition the action should have been commenced on or before the 28th day of March, 1887, but it was not in fact commenced until the 11th day of July, 1887.

The case also admits that from time to time after the plaintiff had put in proof papers in reference to the loss, and up to on or about the 11th day of May, 1887, the defendants requested the plaintiff to procure and furnish additional particulars concerning the claim, and the plaintiff, from time to time, procured and furnished the same, and the said claim was completed more than sixty days.

prior to the commencement of this action, namely, on or about the 11th day of May, 1887.

I am of opinion that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars concerning the claim up to the time mentioned in the case, and thereby putting him to loss of time, trouble, and expense in procuring and furnishing the same was a waiver of, and precluded the defendants from setting up the 22nd statutory condition.

In *Cornish v. Abington*, 4 H. & N. 549, Pollock, C.B., said, (p. 556 :) " If any person by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

This statement of the law was cited with approval, and held applicable to prevent a purchaser of land from recovering back her deposit on the ground that there was no sufficient agreement for the purchase within the Statute of Frauds, because she had made requisitions on the title to the land purchased: *Thomas v. Brown*, 1 Q. B. D. 714.

In *Ex p. Adamson*, 8 Ch.D. 807, James, L.J., said, (p. 817:) " Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do."

The setting up of the 22nd statutory condition by the defendants, after the plaintiff had been put to loss of time, trouble, and expense in procuring and furnishing additional particulars of his claim at their request, would certainly work a wrong to the plaintiff, whose time, trouble, and expense, incurred at the request of the defendants, would,

by the setting up of this condition, be wholly thrown away.

I refer also to *Hughes v. The Metropolitan R. W. Co.*, 1 C. P. D. 120; *Maythorn v. Palmer*, 11 L. T. N. S. 261; *Brady v. The Western Ins. Co.*, 17 C. P. 597; *Smith v. The Commercial Union Ins. Co.*, 33 U. C. R. at page 87; and *Davis v. Canada Farmers' Ins. Co.*, 39 U. C. R. 452.

The great weight of authority in the United States is in favour of the view I have taken, and in addition to the cases cited on the argument, I may refer to *Coursin v. Pennsylvania Ins. Co.*, 46 Penn. St. 323, and *Wood* on Limitation of Actions, sec. 50, and cases there cited.

In my opinion the motion must be dismissed, with costs.

STREET, J. (after briefly stating the facts).—The plaintiff does not allege that he was misled by the requests of the defendants into delaying his action until after the year had expired, but rests his case upon the fact that before and after the year had expired, they requested him to procure and furnish additional particulars concerning his claim; and the question is, whether the fact of their having done so, coupled with the inference which we are at liberty to draw from this circumstance, that he was put to some trouble and loss of time in procuring and furnishing the particulars asked for, operates as a waiver of the defendants' right to insist upon the condition.

In the absence of any agreement not to insist upon the condition, the question of waiver must come down to an enquiry as to whether what has occurred operates against the defendants as an estoppel; for the defendants must be held entitled to insist upon the protection of the clause in the policy, it being clearly not an unreasonable one, unless they have either agreed not to set it up, or have so acted as to entitle the plaintiff to say that they are estopped from taking advantage of it.

I regret to find myself compelled to differ from the conclusions at which the Chief Justice has arrived. I think that the doctrine of estoppel has been carried extremely

far in many of the cases, and that to apply it here would be to carry it a step farther than it has yet gone.

The language of Chief Baron Pollock in *Cornish v. Abington*, 4 H. & N. 549, is certainly very wide: it must, of course, be taken with the additional qualification that the person seeking to set up the estoppel must shew that he has altered his position, or suffered a wrong, in consequence of the conduct or expressions of the other. The language must also be construed with reference to the facts of the case in which it was used; and an examination of those facts shews that the defendant was found by the jury to have so acted as to enable one Gover to obtain goods from the plaintiff, and to lead the plaintiff to suppose that the defendant was his debtor for them. The Court held that the defendant could not, in the face of his conduct, set up that Gover and not he himself was liable to pay for the goods. That was a case plainly within the principles established in *Pickard v. Sears*, 6 A. & E. 469, as explained by *Freeman v. Cooke*, 2 Ex. 654, and did not carry the law beyond those principles.

But in the case of *Thomas v. Brown*, 1 Q. B. D. 714, the language in *Cornish v. Abington*, is quoted by Mr. Justice Mellor as authority for a proposition which, though certainly within the language, carries the law beyond the authority of the case in which it is used. It was there held in effect that a purchaser who had paid a deposit upon a purchase of land, could not, after demanding and receiving an abstract of title and delivering requisitions upon it, set up that there was no valid contract within the Statute of Frauds, and proceed to recover back his deposit. The decision is placed upon two grounds; one being that the money having been paid with a full knowledge of all the facts, could not be recovered by the person paying it; the other, that the case is within the dictum in *Cornish v. Abington*, and that the purchaser having accepted the contract, could not be allowed afterwards to reject it.

The case is easily sustainable upon the first ground, which, however, has no bearing upon the facts of the

present case ; if sustainable upon the second ground, it would be a strong authority here. But I am of opinion that upon this second ground it was wrongly decided, as being in direct conflict with earlier and later authorities. The effect of the decision would be to hold that a parol contract for the sale of lands is taken out of the operation of the Statute of Frauds by estoppel in every case in which the purchaser has asked for an abstract and delivered requisitions upon the title. The decision in fact gives to these facts, under the plausible disguise of an estoppel, an effect which has been denied to them when presented in their proper garb of acts of part performance. "The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the *possession, use, or tenure* of the land : " per Lord Selborne in *Maddison v. Alderson*, 8 App. Cas. at p. 480.

Apart from this case of *Thomas v. Brown*, the English and Canadian authorities upon the question of estoppel seem to confine the doctrine within limits which do not include the present case.

In *Hughes v. Metropolitan R. W. Co.*, 2 App. Cas. 439, a landlord had given a notice to the tenant to repair within six months, and sought to enforce a forfeiture of the lease upon the ground that the repairs had not been done ; it was held that the letters between the parties amounted to a proposal by the tenant and an assent by the landlord, that the period fixed by the notice to repair should be suspended pending negotiations between them for a sale to the landlord of the tenant's interest.

In *Ex p. Moore*, 2 Ch. D. 802, a landlord had, by notice to the trustee in liquidation, called upon him to disclaim, within twenty-eight days, a lease held by the debtor, and afterwards and on the day before the twenty-eight days expired, by letter requested him to reply to the notice "at his earliest convenience." It was held that this letter was calculated to put the trustee off his guard, and the landlord

was not allowed to insist that the trustee was bound to disclaim within the period fixed by the notice. See also *Carr v. The London and North Western R. W. Co.*, L. R. 10 C. P. 307, in which the various recognized propositions of an estoppel in *pais* are set forth.

In *Ramsden v. Dyson*, L. R. 1 H. L. at p. 141, Lord Cranworth says: "If a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. * * If my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." See also *Brady v. Western Assurance Co.*, 17 C. P. 597; *Ex p. Adamson*, 8 Ch. D. 807; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. at p. 87; *Davis v. Canada Farmers' Ins. Co.*, 39 U. C. R. 452.

The principle to be gathered from the cases appears to be this: that where the party setting up the estoppel was aware of all the facts at the time he alleges the estoppel took place, he must shew conduct or expressions on the part of the other amounting to an assertion, express or implied, on his part, that he would not insist upon the rights against which the estoppel is attempted to be set up. I can find nothing equivalent to such an assertion on the part of the defendants here. The requests they made during the currency of the year were within their rights under the policy, and can certainly have no effect as showing an intention to waive any other rights. When the year had expired the plaintiff must be taken to have known that his right of action was gone, and in the words of Lord Cranworth, "it was his folly" to expend time, trouble, or expense in furnishing information to the defendants, without first having an assurance, which was not forthcoming, that if the

requests were satisfactorily complied with, the condition as to time would not be insisted upon.

A clear distinction, I think, exists between the effect of acts done before and acts done after the rights of the party setting up the estoppel have expired. Much stronger circumstances would be necessary to reinstate rights which have expired, than to keep alive rights which still exist.

I am of opinion that the facts here do not prevent the defendants from setting up the condition in the policy limiting the plaintiff's right of action to a year from the loss; and I think the action should be dismissed, with costs, and that the defendants' motion should be granted, with costs.

FALCONBRIDGE, J., was not present at the argument, and took no part in the judgment.

The motion was dismissed, with costs, by reason of the disagreement of the two Judges.

[QUEEN'S BENCH DIVISION.]

O'BYRNE V. CAMPBELL.

Water and watercourses—Drainage—Ditches and Watercourses Act, 1883, sec. 13—Award—Duty of township engineer—Damage to land—Proximate cause.

After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring land-owners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, &c.

Held, that the provision of sec. 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof.

The other provisions of sec. 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance.

Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages.

MOTION by the plaintiff to set aside the judgment at the trial dismissing the action, and to enter judgment for the plaintiff.

The action was tried by Rose, J., without a jury, at the Goderich Autumn Assizes, 1887.

The motion was argued before the Divisional Court on the 14th February, 1888.

The facts appear in the judgment.

Wallace Nesbitt, for the plaintiff.

Idington, Q.C., for the defendant.

March 9, 1888. ARMOUR, C.J.—The plaintiff was the owner of the south half of lot number six in the third concession of the township of McKillop; Patrick and Edward Roach were the owners of the north half of lot number six in the second concession; the Canada Company were the

owners of lot number seven and the east half of lot number eight in the second concession ; and John Downey was the owner of the west half of lot number eight in the second concession of the said township.

The plaintiff had constructed a drain from the allowance for road between the second and third concessions at the south east angle of his lot, along the allowance for road between lots numbers five and six in the second concession for a short distance along the easterly limit of lot number six in the second concession.

The plaintiff then, by a requisition under the provisions of the Ditches and Watercourses Act, 1883, procured an award to be made by the defendant, the engineer of the township of McKillop, for the continuation of the drain so made by the plaintiff across the south half of lot six, lot seven, and the east half of lot eight, and across the west half of lot eight to a drain theretofore awarded by the defendant to be made; which award provided for the making of the said continuation by the township of McKillop a part of the way across said lot number six, and for the completion thereof by the 30th November, 1884; for the making of the said continuation by the plaintiff another part of the way across said lot number six, and for the completion thereof by the 15th November, 1884; for the making of the said continuation by Patrick and Edward Roach the residue of the way across said lot number six, and for the completion thereof by the 10th November, 1884; for the making of the said continuation by the Canada Company all the way across lot number seven and the east half of lot number eight, and for the completion thereof by the 1st November, 1884; and for the making of the residue of the said continuation by John Downey, and for the completion thereof by the 15th October, 1884.

The plaintiff's statement of his cause of action alleged that after the time fixed in and by the said award for the completion of the said work, the plaintiff, who was one of the parties interested in the said award, in writing required the defendant as such engineer, pursuant to the statute in

that behalf, to inspect the said ditch or watercourse with the view and object of having the same completed according to the said award, and that the defendant did not, as was his duty, inspect the said ditch or watercourse, or cause the same to be completed according to the said award; but, on the contrary, wholly failed and neglected so to do, whereby the provisions of the said award had not been carried out, and the plaintiff had in consequence been unable to cultivate or use his said land, and had his grass and other crops growing thereon greatly injured and destroyed, and had lost the beneficial use of his said land from the water which should have been carried away by the said drain remaining thereon.

The plaintiff's action is thus wholly grounded upon the provisions of sec. 13 of the Ditches and Watercourses Act, 1883, and I am of opinion that it is not maintainable.

The provision of that section as to the inspection by the engineer is no doubt imperative; and if the action would lie for the breach of this imperative duty, it is answered by the evidence that he did inspect, and if it were not so answered, it would be difficult to hold that the damages claimed were the proximate, necessary, or natural result of the breach of this duty.

The other provisions of that section are merely permissive, and I do not understand that any action will lie for the non-performance of duties which are merely permissive.

Were it otherwise, it would be impossible, I think, to hold that the damages claimed were the proximate, necessary, or natural result of the breach of them.

The damages claimed by the plaintiff were the proximate, natural, and necessary result of the drain not having been completed according to the terms of the award; but those who, by the terms of the award, ought to have done the work of digging the drain were the persons proximately responsible for the damages, and not the defendant.

I refer to *Walker v. Goe*, 3 H. & N. 395; S. C., 4 H. & N. 350; *Barber v. Lesiter*, 7 C. B. N. S. 175; *Nicholl v.*

Allen, 1 B. & S. 916; *Sharpe v. Hancock*, 7 M. & G. 354; *Malone v. Faulkner*, 11 U. C. R. 116.

In my opinion the motion must be dismissed, with costs.

STREET, J., concurred.

FALCONBRIDGE, J., not having been present at the argument, took no part in the judgment.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

STALKER V. TOWNSHIP OF DUNWICH ET AL.

Municipal corporation—Pathmaster—Public duty—Private interest—R. S. O. (1877), ch. 73, sec. 1—Liability—Acquiescence by corporation—Compensation under Municipal Act—Assessment of damages.

A pathmaster is “an officer or person fulfilling a public duty” within the meaning of R. S. O. (1877), ch. 73, sec. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where, professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual.

And where a pathmaster of a township in the course of his employment so acted as to disentitle himself to the protection of the statute, and thereby caused damage to the plaintiff.

Held, that the township corporation as well as the pathmaster was liable; and even if not originally so, the corporation made itself liable by sanctioning what was done, and refusing to amend it after notice.

Damage to land arising from an overflow of water caused by negligently diverting the water from its natural course without providing a sufficient outlet, is not the subject of compensation under the Municipal Act, 1883.

Since the O. J. Act damages should be assessed up to the date of judgment.

THIS was an action against the corporation of the township of Dunwich and Daniel McMillan, the younger, in which the plaintiff claimed \$500 damages and an injunction restraining the defendants from bringing water upon,

and overflowing his lands, being the north-half of lot 14 in the third concession of the township of Dunwich, in the county of Elgin.

Certain ditches, which were cut upon the road allowance between the second and third concessions of Dunwich, brought water from the neighbouring land and road upon the plaintiff's land, and another ditch by which the plaintiff drained his land was filled up, and the overflow was thereby caused.

The plaintiff charged that the damage was due to the negligence of the defendants; the defendant McMillan, who did the work, being the owner of the land adjacent to the plaintiff's, and being also the pathmaster of the township.

The defendants pleaded "not guilty" by statutes, R. S. O. ch. 73, secs. 1, 9, 10, 11, 20; The Municipal Act, 1883, sec. 482, sub-secs. 2 and 15, and sec. 550, sub-sec. 1.

The action was tried before Rose, J., and a jury at the London Autumn Assizes, 1887.

The jury found that the defendant McMillan did not do the work in the discharge of his public duty as pathmaster, but was actuated by some indirect motive, such as personal advantage or benefit, or ill feeling towards the plaintiff: that the plaintiff's land had been injured by water lying upon it, which was brought down from a new ditch made by McMillan; and that the ditch was negligently constructed.

Rose, J., directed judgment to be entered for the plaintiff against both defendants for \$30 damages, an injunction, and costs of suit.

December 13, 1887, *Lash*, Q. C., on behalf of the defendants obtained orders *nisi* to set aside the verdict and judgment for the plaintiff, and to enter judgment for the defendants, or to vary the judgment, or for a new trial.

February 8, 1888, *Lash*, Q. C., for the defendant corporation, and *Glenn*, for the defendant McMillan, supported the orders *nisi*.

W. R. Meredith, Q. C., shewed cause.

March 9, 1888. ARMOUR, C. J.—A pathmaster is no doubt “an officer or person fulfilling a public duty,” and for anything done by him in the performance of such public duty he is entitled to the protection of the Act R. S. O. ch. 73.

But where a person who is a pathmaster and, professing to act as such, uses his position as such to promote his private interest, making his private interest paramount and his public duty subservient to his private interest, subjecting his public duty to his private interest and making the promotion of his private interest the primary object of his action, he cannot be said in such case to be performing a public duty, and he thereby disentitles himself to the protection of the Act, and may be proceeded against for any act so done by him as if he were a private individual: *Neill v. McMillan*, 25 U. C. R. 485.

The evidence, in my opinion, well warranted the jury in finding as they did that the defendant McMillan was not acting in the public interest in the discharge of his duty, but was actuated by some indirect motive, such as personal advantage or benefit, or ill feeling toward the plaintiff.

Notwithstanding the defendant so acted as to disentitle him to the protection of the Act, he was still the servant of the defendant corporation, and it was, in my opinion, liable for what he did in the course of his employment, and so was liable for the doing of the work in the manner complained of.

But if not originally liable the defendant corporation certainly made itself liable by sanctioning what was done, and keeping and maintaining the work as done, and refusing to amend it, although frequent complaints were from time to time made to it of the manner in which it had been done, and of the injury which the plaintiff was suffering therefrom: *Nevill v. The Corporation of Ross*, 22 C. P. 487.

The work was done in a negligent manner; water was improperly brought down the highway to a point opposite to the plaintiff's land, which would not have naturally

come there, and by the negligence of the defendants no sufficient outlet was made for carrying away the water so brought down, which by reason thereof overflowed the plaintiff's land.

The damage so arising was not the subject of compensation under the Consolidated Municipal Act, 1883, but was properly the subject of an action.

The damages were, I think, properly assessed.

Since the Judicature Act damages should be assessed up to the date of the judgment; damages were so assessed in equity before the Judicature Act, but at law up to the commencement of the action; now, I think the equity practice ought to prevail, and such practice is more in harmony with the rules of the Judicature Act and is more convenient and just.

On the whole I am of opinion that the findings of the jury were supported by the evidence and that no sufficient ground for a new trial is shewn, and that the judgment pronounced upon the findings is the proper judgment, and that the orders *nisi* should be discharged with costs.

STREET, J., concurred.

FALCONBRIDGE, J., was not present at the argument, and took no part in the judgment.

Orders nisi discharged.

[COMMON PLEAS DIVISION.]

WILKINSON V. HARVEY ET AL.

*Solicitor and client—Liability of execution creditors for wrongful seizure—
—Liability for acts of solicitor.*

The defendants, who lived in Hamilton, had a claim against W. at Ingersoll, and thinking he was carrying on business on his own account issued, a writ therefor through their solicitors C. & B., which was served by C. who went to Ingersoll under special instructions from defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff who accordingly notified C. & B. C. & B. refused to accept this, and wrote the sheriff in effect that he had acted improperly in not seizing the goods, on *ex parte* statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods and applied for an interpleader order. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure.

Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were acting under special instructions from the defendants to take such proceedings as they might think best, the latter were liable to the plaintiff.

Smith v. Keal, 9 Q. B. D. 340, distinguished.

THIS was an action for damages for seizure of the plaintiffs' goods under an execution against his brother at the suit of the defendants.

The cause was tried before Rose, J., without a jury, at Woodstock, at the Fall Assizes, 1887.

G. T. Blackstock and Walsh, for the plaintiff.

P. D. Crerar, for the defendants.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts fully appear.

December 13, 1887. ROSE, J.—The questions are :

1. Whether the letter of the 5th of August, 1887, from Messrs. Crerar & Bankier, read in the light of the surrounding facts, was an instruction to seize the goods in question.

2. If so, was the letter written under the defendants' authority, either express or implied ?

3. If so, the amount of damages.

The plaintiff's counsel stated they did not urge that they could rely upon ratification.

Sometime in February, 1887, Mr. P. D. Crerar, one of the firm of solicitors acting for the defendants in this matter, having in their hands a claim by the defendants against the plaintiff's brother, Wm. Wilkinson, went to Ingersoll, where he found him carrying on business, and served him with a writ of summons at the suit of the now defendants. He told him the reason he was being sued was that the defendants "felt very hard" at the loss they had sustained through his failure, and that they wanted him to do something more for them if he could. He replied that that was impossible ; that he had given up everything he had, and that the business belonged to his brother, the present plaintiff. Mr. Crerar informed him that Messrs. Harvey & Co. felt very hard that he had started again, when Wm. Wilkinson replied that he had not anything to start with—that the business was his brother's.

Judgment was obtained in that suit on the 4th of March, 1887, but execution was not issued until the 30th of July. The sheriff received it on the 1st of August.

The immediate cause for issuing execution was the receipt by J. H. Lamb, of Hamilton, assignee of William Wilkinson, of a letter from him dated 28th July, asking the assignee to assist him in protecting his household effects against a claim by the Bank of London on which he had been sued.

The execution was in the usual form, and endorsed to levy the debt, costs, &c.

On receipt of the writ, the sheriff sent out his officer, who was informed by the defendant in that suit that he had nothing, everything having been given up under the assignment to Lamb. He, believing the statements ; made no seizure ; and, on the 2nd of August, 1887, sent to Messrs. Crerar & Bankier, the following post card :

" In re Harvey et al. v. Wilkinson.

" DEAR SIR—I sent my officer to Ingersoll. He finds defendant has no goods of his own.

" Yours truly,

" GEO. PERRY, Sheriff."

To this the following reply was sent :

" Hamilton, 3rd Aug., 1887.

" To the Sheriff, Woodstock.

" Dear Sir—

" Harvey v. Wilkinson.

" We have your post card of yesterday's date in which you state that your officer finds defendant has no goods of his own. We were not aware that sheriff's officers were supposed to decide upon probably *ex parte* evidence, whether or not the goods in possession of which he finds the execution debtor and over which said debtor is exercising the rights of owner, technically belong to such debtor or to somebody else. We have the defendant's own statement that he owns the furniture of the house in which he lives ; and we insist upon your officer doing his duty under the writ, and seizing the same. We have been informed that Mr. Wilkinson is the owner of a grocery business in Ingersoll. We are quite sure that no evidence was submitted to your officer sufficient to enable him to decide, even were he competent to do so, whether this is the case or not. We have wired you to expect this letter : and we must insist on an immediate action on your part according to the tenor of the writ now in your hands. Any delay or negligence may result in the most serious loss to our clients ; and, if any such loss occurs, we shall most certainly hold you responsible."

Upon receipt of that letter the sheriff went to Ingersoll, and seized all the goods, both the household and those in the store, and applied for an interpleader order.

Upon the application, the goods in the grocery store were abandoned, and the sheriff ordered to withdraw from possession, and the costs of the claimant, the present plaintiff, were ordered to be paid.

In the meantime, however, the sheriff took stock, closing the store for a week ; and for damages resulting therefrom this action has been brought.

Whether there was in this case a direction to seize so as to make the execution creditor liable is a question of fact. See *Smith v. Keal*, 9 Q. B. D. 340. Assuming the authority of the solicitors to give the instructions, were they given in fact ? I have arrived at the conclusion that they were.

The sheriff had investigated the facts through his officer; and, either wisely or rashly, acted upon the information received, and decided not to seize.

As to the household goods, the execution creditor, besides challenging his right to act upon such information, gave him express instructions to seize.

As to the goods in the store the position assumed by the solicitors is, that both they and the sheriff knew that it was the duty of the sheriff to seize any goods of the defendant named in the writ: that they gave him such information as they had received, and challenged him to do his duty under the writ, leaving him to his protection by interpleader, if the goods were claimed, and refused to accept any responsibility in directing him.

I do not think that is the fair reading of the letter. They, the solicitors, had issued the writ of summons because the creditors had discovered that their debtor was carrying on business. The sheriff had concluded that the goods did not belong to him: they tell him he acted on insufficient information: that he must not act upon *ex parte* statements: that they insisted upon immediate action on his part, according to the tenor of the writ; and threatened an action for damages if any loss was occasioned through delay or negligence.

Now what would any one take to be meant by such a letter? Did it not fairly read thus? "You have acted improperly in not seizing the goods. You cannot act on the information received. You must take such action as will enable you to test the truth of these *ex parte* statements." In other words, you must seize; and, if a claim is made, apply for an interpleader order? If it did not mean that, then it is to my mind insensible and misleading, for I do not know how the sheriff could have relieved himself from the responsibility of his position after such threats as were contained in the letter without seizing and interpleading.

If an execution creditor expressly directing a sheriff to seize certain goods, and then to interplead, would be liable,

—then assuming the solicitor's authority—it seems to me the defendants would be liable upon this letter, for that is what in fairness, I think it must be taken to have meant; or rather I think the sheriff must be held to have been justified in so reading it. It may be the solicitors intended the letter to have the effect of putting the sheriff in motion without incurring any responsibility; but, if so, I think they wrote with too much vigour.

Then was the letter written under the defendants' authority, either express or implied?

Smith v. Keal, decided it was not within the scope of the implied authority of the solicitor of a judgment creditor issuing a *fi. fa.* verbally to direct the sheriff to seize particular goods; but that decision is as to the scope of a solicitor's authority on the ordinary instructions in the suit.

Here, I think, the facts are quite different. The suit was instituted because the debtor had started the business in question. One of the solicitors went up personally with the writ and served it himself, endeavoring to effect a settlement, and when the sheriff determined not to seize threatened him with an action for damages.

The defendants were not examined at the trial; but portions of the examination of Mr. Sterling, one of the firm, were read and put in evidence; from which, as might have been inferred, it appears that Mr. Crerar went up to see the debtor under instructions, and that it was left to his discretion to pursue such course as he thought proper: that he "understood that a seizure had been made; and that the sheriff had reported that the man had no goods:" that he "understood the sheriff had seized the stock in the grocery store and some furniture in William Wilkinson's house;" and that "it was left in our solicitors' hands to go on with the seizure or abandon as they thought best:" that "they had several conversations with" their "solicitors at different times, both before and after the seizure;" and that they did not tell their "solicitors to withdraw from the seizure of the property."

At the trial before me, Mr. F. D. Crerar acted as counsel

for the execution creditors, the defendants herein, and stated his firm was not acting as the general solicitors for the execution creditors, but as solicitors in this matter.

I come to the conclusion of fact that the firm of Crerar & Bankier was specially instructed in this matter to take such steps or proceedings as it might think best to recover the claim: that its instructions were not confined to acting simply as solicitors in the ordinary course, viz., to issue a writ of summons, and continue the usual proceedings to judgment and execution, but were such as gave it enlarged powers and a wider discretion: that in accordance therewith it sent one of the firm to Ingersoll to endeavour to effect a settlement, armed with the persuasive power of a writ, which he personally served; and thereafter, and after judgment, having received the letter sent by William Wilkinson to the assignee, and having had interviews with its client, it instructed the seizure, as above set out.

I think I would be shutting my eyes to the facts and probabilities—the fair inferences—if I held that the instructions were not wider than those ordinarily given to a solicitor when he receives an account with the usual instructions to collect. If clients desire their solicitors to act for them, as, what I may call, men of business; to travel through the country and interview their debtors; to endeavour to make arrangements with them, and to serve process in aid of their endeavours, leaving it to them to act according to their discretion, it seems to me an agency is established which takes them out of the protection of such decisions as *Smith v. Keal*, and leaves them liable for any and every act taken to further their interests, and to achieve the purpose for which the solicitors or agents were employed.

It seems to me that such acts may be ratified, and were in this case ratified, the facts distinguishing this case from *Kennedy v. Patterson*, 22 U. C. R. 556, and *Tilt v. Jarvis*, 7 C. P. 145. *Pardee v. Glass*, 11 O. R. 275, may also be referred to.

As to the question of damages. It is true the plaintiff is not carrying on business for his own profit altogether; that is, he allows his brother to take a certain sum for maintenance. Apart from this the plaintiff no doubt has the legal right to the profits—certainly his must be the loss if the business fails.

As put by Mr. Blackstock, if he desires to be generous to his brother, the defendants have no right to interfere.

The evidence for the plaintiff puts the actual loss of profits for the week at \$35. I have computed the four weeks prior and subsequent to the seizure, and find a falling off of about \$137, or a little over. I do not know that this is attributable entirely to the seizure. If it is, the loss of profits as to it would be about \$30.

The loss occasioned by the interpleader proceedings would be measured by the costs. I cannot find on the evidence that the financial credit was materially affected. And the sales in the third week after the seizure were \$143, within a few dollars of the largest sale prior to the seizure.

I think I may fairly allow \$100.

As to the costs, the letter to the assignee as to the furniture induced the seizure; and is fairly open to the charge of containing an offer to pay the assignee to induce him to do either more or less than his duty. Wm. Wilkinson's statement to the sheriff that all his property had been given up to the assignee, was, as it appeared to the solicitors, untrue, and no doubt influenced them in this action.

Moreover, \$200 could have been recovered in the county court; and, in my opinion, the plaintiff had no just right to claim or expect to recover any sum in excess of \$200.

I allow the plaintiff costs according to the county court scale, and without the right to set off.

Judgment for plaintiff.

[COMMON PLEAS DIVISION.]

REGINA V. LEE.

Canada Temperance Act, 1878—Police magistrate appointed for county exclusive of city—Right to sit in city to hear offence arising in county—Appointment “during pleasure”—Necessity for place set apart to hear offences—Alternative jurisdiction—Constitutional law—Appointment of police magistrates.

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate for the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the Canada Temperance Act, did unlawfully sell intoxicating liquors, &c., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his G.'s office, “Court House, Brantford,” before him, or such justices of the peace for the said county as may then be there, to answer said charge. On an application for a prohibition to prohibit G. from hearing the complaint; *Held*, by ROBERTSON, J., that under 46 Vic. ch. 4, sec. 9, (O) and sub-secs. G. had authority to hear, adjudicate and determine the matter of the complaint at the city of Brantford.

Held, also that G.'s commission was properly issued during pleasure; and that it was not necessary under sub-sec. b sec. 103 of the Canada Temperance Act, that the town of Paris, should be excluded from the operation of the commission; but *quære*, whether the police magistrate could try an offence arising within the said town.

Held, also that there was nothing in the statute which required the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor, and under 48 Vic. ch 17, sec. 4, (O), G. had the right to occupy the court room.

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition.

Held, also that the appointment of police magistrates is not *ultra vires* of Legislature of Ontario.

Regina v. Bennett, 1 O. R. 441, followed.

On appeal to the Division Court, the judgment was affirmed.

THIS was an application to prohibit a police magistrate from hearing a prosecution for the illegal sale of intoxicating or spirituous liquor contrary to the prohibiting part of the Canada Temperance Act, 1878, in force in the county of Brant.

On the 17th November, 1886, James Grace, Esq., was appointed by the Lieutenant-Governor of Ontario, “to be a Police Magistrate for the said county of Brant, (exclusive of the city of Brantford),” *habendum*, “during our pleasure.”

On 14th March, 1887, an information was laid before Mr. Grace, as such police magistrate, by one George Pike, license inspector of the county of Brant: "that Joseph Lee did, at the township of South Dumfries, in the county of Brant, on the 31st day of January, 1887," (afterwards amended to read *24th day of January*) "a place wherein the second part of the Canada Temperance Act, 1878, then was, and now is, in force, unlawfully sell intoxicating liquor contrary to the Temperance Act, 1878;" and on the 15th day of the same month of March, Mr. Grace issued his summons, directed to Joseph Lee of the township of South Dumfries, setting forth the charge, and commanding him "to be, and appear on Monday next, the 21st day of March, 1887, at 1.30 o'clock, p.m., at my office, Court House, Brantford, before me, or such justices of the peace for the said county as may then be there, to answer to the said charge," &c. "Given under my hand and seal, this 15th day of March, 1887, at Brantford, in the county of Brant, aforesaid."

On the 19th day of March, 1887, *McKenzie*, Q. C., obtained a summons in Chambers from Wilson, C. J., calling upon Mr. Grace and the informant, at the instance of the defendant, Joseph Lee, to show cause why a prohibition should not issue against the said James Grace, prohibiting him from hearing and adjudicating upon the matter of the said information and complaint, with costs, upon the following grounds:

1. That the magistrate has no jurisdiction sitting in the city of Brantford, to enquire into or adjudicate upon the matter of the said information and complaint.

2. That the commission of the said magistrate should be for a temporary period.

3. That the commission of said magistrate should exclude the town of Paris from the operation thereof.

4. That the magistrate must exercise the functions of his office in relation to the said information and complaint, at a police court set apart and appointed by law in that behalf.

5. That the summons to the applicant does not allege that the Canada Temperance Act of 1878, was in force in the county of Brant.

6. That the summons to the applicant specifies an alternative jurisdiction for the inquiry into and adjudication upon the subject matter thereof:

On that application was filed either the original summons issued by Mr. Grace, or the duplicate original, served on the defendant; a verified copy of Mr. Grace's commission; and an affidavit made by the defendant, in which he stated that there had been no police court set apart and appointed by law wherein Mr. Grace might exercise the functions of his office; and the room in which he had hitherto assumed to exercise, and in which, as the deponent believed, he intended, in this case, to exercise such functions, and which he designated his office, was an apartment in the court house, used for the accommodation of petit jurors; and the defendant also filed a certificate under the county seal, signed by the county clerk, setting forth, contrary to the statement in the affidavit, that on 25th March, 1886, the county council did set apart or grant to Mr. Grace, as a justice of the peace, the use of one of the jury rooms in the court house.

He also filed Mr. Grace's affidavit as to the latter fact.

McKenzie, Q. C., supported the motion, and referred to *Hamilton Election Case*, 10 C. L. J. N. S. 170; *Regina v. Riley*, 12 P. R. 98; 41 Vic. ch. 4, sec. 9, sub-s. 3 (O.); B. N. A. Act, sec. 91; R. S. C. ch. 106, sec. 103, sub-s. (b) secs. 105, 107, 109, p. 1428-29; *Addison on Torts*, Am. ed., 1876, sec. 1453; R. S. O. ch. 72; 48 Vic. ch. 17, sec. 4, (O.); *Regina v. Young*, 13 O. R. 198.

Delamere, contra, referred to R. S. C. ch. 106, sec. 2, sub-sec. (b), p. 1401, sec. 103, sub-sec. (b), p. 1428; *Regina v. Bennett*, 1 O. R. 445, as well as the cases and statutes cited on other side.

April 29, 1887. ROBERTSON, J.—Section 9 of 41 Vic. ch. 4, (O.), enacts: “When the Lieutenant-Governor in Council is of opinion that the due administration of justice requires the temporary appointment of a police magistrate for a county, or any part of a county, the Lieutenant-Governor in Council may appoint such police magistrate accordingly; and any magistrate so appointed shall hold office during the pleasure of the Lieutenant-Governor, and shall have and exercise within the county or territory for which he is appointed, all the powers, authorities, rights, privileges, and jurisdiction, so far as the same are within the authority of the Legislature of Ontario, by law appertaining to police magistrates appointed for cities,” &c.

Sub-section 2: “Every such police magistrate shall *ex officio*, be a justice of the peace for the whole county for which, or for part of which, he has been appointed, but it shall not be his duty, unless he finds it convenient so to do, to entertain any complaint with reference to an offence committed outside of the limit of the territory for which he is police magistrate.”

Sub-section 3: “ * * ; and no such police magistrate shall have authority to act in any case for any city, town or village, which has a police magistrate of its own, except at the General Sessions, &c. * * ; but nothing herein contained shall be construed to prevent a police magistrate appointed under this Act from acting within any such city, town or village, in respect of any case arising outside of such city, town or village.”

A perusal of the statutes above referred to and quoted from, makes it clear, in my opinion, that there is nothing in any of the grounds so elaborately set forth in the summons.

The Statute of Ontario, 41 Vic. ch. 4, sec. 9, authorizes the Lieutenant-Governor in Council, when he “is of opinion that the due administration of justice requires the temporary appointment of a police magistrate for a county or any part of a county,” to make such appointment; and when the magistrate is so appointed, he is to “hold office

during the pleasure of the Lieutenant-Governor ;” and sub-sec. 2 of that section expressly declares that, “every such police magistrate shall, *ex officio*, be a justice of the peace for the whole county for which, or for part of which, he has been appointed ;” but he may act as his convenience allows, in reference to entertaining complaints “with reference to offences committed outside of the limits of the territory for which he is police magistrate.”

Mr. Grace is, therefore, not only a police magistrate for the whole county of Brant, exclusive of the city of Brantford ; but by virtue of his being such, he is a justice of the peace, not only for the county outside the city but within the city ; and was it not for the fact that the city of Brantford has a police magistrate of its own, he could act in any case for the city ; and even now, at the request or in the case of his illness or absence of the police magistrate, he would have authority to act in such cases ; but the latter part of sub-sec. 3 makes it clear that Mr. Grace can here adjudicate upon and determine *within* the city, in respect of any case arising outside of such city, so long as the case has arisen within the territorial jurisdiction expressed in his commission.

Now the case in respect to which he has issued his summons against defendant, arose within the county of Brant, that is within the township of South Dumfries, outside of the limits of the city of Brantford. The city of Brantford, however, is situated within the territorial limits of the county, and it is not set apart for judicial purposes, only for municipal. Mr. Grace, therefore, is clearly within his jurisdiction, and within his right when he hears, adjudicates upon and determines the case in respect to which he has issued his summons.

In reference to the commission appointing Mr. Grace, I think it cannot be impugned on the grounds mentioned in the summons. It is true, the statute says, that when in the opinion of the Lieutenant-Governor in Council the due administration of justice requires the temporary appointment of a police magistrate for a county, or any part

thereof, such appointment may be made, and the magistrate so appointed shall hold office *during pleasure*. No authority or decided case has been referred to or cited in support of the objection taken; and I can see no reason why the commission should express in words that the appointment is *temporary*, or that it shall be for a *fixed term*, or during the existence of any particular state of affairs in the territorial district for which the justice is appointed; it is, however, "during pleasure," and when in the opinion of the Lieutenant-Governor in Council the cause for the appointment has ceased to exist, the power is reserved to put an end to the appointment. In fact I do not think it would be well to leave it in any other form, or that it should be for any definite period. If made for the latter, and not "during pleasure" it would not be according to the statute. It is really "temporary" after all, *i. e.*, during the time, which, in the opinion of the Lieutenant-Governor in Council, the due administration of justice requires that the appointment should exist.

Nor do I see that the commission should exclude the town of Paris from its jurisdiction.

Sub-section (b) of section 103 of the Canada Temperance Act, 1878, declares that "such prosecution may be brought—in the Province of Ontario * * if the offence was committed in any *county, city or town* having a police magistrate, then before such *police magistrate*; or, in his absence before the *mayor or any two justices of the peace*."

Paris is not in the same position as a city. It is not set apart, so far as I know, for municipal purposes, any more than any one of the townships forming the county. It is true it has a mayor, but it also has a reeve, and, I presume, a deputy-reeve, and the reeve and deputy-reeve represent the town in the county council for municipal purposes; not so the city; it has no representation in the county council. Nor does it in any way like the town contribute to the municipal revenue of the county.

I am, therefore, not prepared to say, although it is not necessary to decide the point, nor do I do so, that

Mr. Grace would not have jurisdiction within the town of Paris to try any case which arose within the town, keeping in view sub-sec. 2 of sec. 9 of 41 Vic. ch. 9 (O.) that he by virtue of his commission is, "*ex officio*, a justice of the peace for the whole county;" and sub-sec. 4 of same section, which declares that he, "shall have power to do alone whatever is authorized by any statute in force in this Province * * to be done by two or more justices of the peace * * *And such police magistrate, shall have such power while acting any where within the county for which he is ex officio a justice of the peace.*"

The fifth objection was abandoned on the argument; and, in my judgment, it would have been just as well to have abandoned the fourth and sixth also, as there is nothing in them, so far as this application is concerned.

There is nothing in the statute which requires the police magistrate to exercise the functions of his "office at a police court set apart and appointed by law in that behalf."

It is true under 48 Vic. ch. 17, sec. 4 (O.) it is the duty of the county council to provide a proper office, &c., "for every county police magistrate;" but the same section provides that "any police magistrate shall, whenever he deems there is occasion therefor, have a right to use any court room or town hall, belonging to the county, or any municipality therein (which has no police magistrate of its own), for the hearing of cases brought before him."

In this case, however, the county council on the 25th March, 1886, did grant to Mr. Grace the use of a jury room in the Court House, in which to hold his courts, when the same was not required for other purposes. Without this, however, he would, under the last referred to sections of the statute have the right to occupy the "Court room."

Whatever force there may be in the objection, in case of a conviction, should Mr. Grace not be present to hear and determine the case when the parties appeared to answer the charge, it certainly affords no ground for a prohibition.

It was also objected at the bar, that the appointment of magistrates is *ultra vires* of the Legislature of Ontario.

The best answer that I can give to that is to be found in the elaborate and learned judgment of Sir Matthew Cameron, the present Chief Justice of this Divisional Court, then Mr. Justice Cameron, in *Regina v. Bennett*, 1 O. R. 445, at p. 462, in which he says,—after referring to the legislation of the Province before and since Confederation on the subject, and the case of *Lenoir v. Ritchie*, 3 S. C. R. 575, cited in support of the contention, as well as *Chitty* on Prerogatives, p. 118:—"In my opinion justices of the peace are part of the system of the administration of justice in the Province; and therefore, under sub-section 14 of section 92 of the British North America Act, the right to legislate as to the appointment is expressly conferred on the Legislature of the Province; and therefore Mr. Young was duly appointed police magistrate for the county of Halton."

The summons must therefore be dismissed, and prohibition be refused, with costs.

From this judgment the defendant appealed to the Divisional Court.

McKenzie, Q. C., in support of the appeal.

Delamere. contra.

June 4, 1887. ROSE, J.—This was an appeal from an order of Robertson, J., refusing an order for prohibition.

The facts are so fully set forth in the carefully prepared judgment of my learned brother, that I need do no more than refer to it.

The grounds urged before us, were :

1. That under the commission to Mr. Grace, containing a non-intromittant clause, he had no jurisdiction to sit in Brantford to try the offence committed in the county.

2. That his commission was invalid because it did not in terms exclude the town of Paris.

In *Regina v. Riley*, 12 P. R. 98, I came to the conclusion that the magistrate, acting under a commission which did not contain a non-intromittant clause, had power to try in

Brantford offences arising in the county. For reasons therein expressed, had his commission contained such a clause, I would have come to the contrary conclusion.

In the case in question, however, I agree that sec. 9 and sub-sec. 2 of 41 Vic. ch. 4, contemplate that a police magistrate appointed under that section for a part of a county should be *ex officio* a justice of the peace for the whole county,—should have power as such police magistrate to act within the city in respect to offences arising without the city, and while acting in such cases within the city should have the power to do alone whatever is authorized to be done by two or more justices of the peace. See sub-secs. 2, 3, 4.

This disposes of the first objection.

As to the second I think a reference to R. S. C. ch. 106, and 41 Vic. ch. 4 (O.), effectually answers the objection.

The commission appoints Mr. Grace police magistrate for the county (exclusive of Brantford). The interpretation clause of ch. 106 sec. 2, says that "county" includes every town, township, parish or other division or municipality except a city within the territorial limits of the county, and also a union of counties for municipal purposes.

Section 103 provides that prosecutions for offences committed in any county may be brought before a police magistrate for such county.

Section 9, of 41 Vic. ch. 4, (O.), provides that the Lieutenant-Governor in Council may appoint a police magistrate for a county, or any part of a county.

If under ch. 4 the word "county" is to be taken as including the city of Brantford, then the appointment was for part of the county within the meaning of section 9, and is for the same territory as is described by the word "county" in ch. 106.

If it is taken as excluding the city of Brantford, then the appointment was for the whole county, and the territorial limits would still be the same as described in sec. 2, ch. 106.

I think we may avoid considering the difficult question raised in *Regina v. Young*, 13 O. R. p. 193, as to which the learned Judges of the Queen's Bench Division differed. The appeal must be dismissed, with costs.

CAMERON, C. J., and GALT, J., concurred.

Motion dismissed, (a.)

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF OXFORD V.
GAIR ET AL.

Principal and surety—Municipal corporation—Bond—Release of surety—New bond.

A bond, intended to be joint and several, was drawn up, to be executed by G., who was plaintiffs' treasurer, and by L. and A. as his sureties. A executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to run as a councillor, A requested the council to release him from the bond, which was agreed to, and on 17th January, 1887, a formal resolution was passed accepting H. as surety in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A. on the first bond,
Held, that he was not liable thereon.

THIS was an action tried before Robertson, J., without a jury, at Ottawa, at the Fall Assizes of 1887. It was brought on a bond made by defendant Gair, who was then the treasurer of the plaintiffs, and Lamerich and Anderson, his two sureties, for the due performance of his duties as treasurer, &c.

Osler, Q.C., and Kydd (of Ottawa), for the plaintiffs.
French and Saunders, for the defendant Anderson.

The learned Judge delivered the following judgment.

(a) See *Regina v. Besmer*, ante p. 266.

January 9, 1888. ROBERTSON, J.—In view of the conclusion I have come to it is not necessary to discuss the rather peculiar condition attached to the bond.

The defendants Gair and Lamerich have suffered judgment by default.

The defendant Anderson, defends, denying all liability on the bonds.

I find as a fact that the bond was intended to be a joint and several bond of all the defendants: that, although it was signed by defendant Anderson on 16th December, 1886, it was not signed by the other defendants until the 17th January, 1887, and was not delivered to the plaintiffs until the latter date, if it was ever delivered at all; and that the defendant Anderson signed it only with the intent that it should not be binding on him until the other defendants also signed it.

I also find that the defendant Anderson having been requested to run as a candidate for municipal honors, at the election of councillors for 1887, he, on the 27th December, 1886, requested the council, before he consented to be nominated as a candidate, to release him from the operation of the bond, not knowing, as I understand the facts, that he was not at that time bound at all, the bond not then having been signed by the others. He says he did not know what his legal liability was at the time; but supposing that whatever it was he was released therefrom, he consented, and was on that day nominated as a candidate, and was afterwards returned to serve as a councillor for 1887.

It appears that afterwards, on the 17th January, 1887, on the occasion of the first meeting of the new council, the following resolution was passed: "Moved by Mr. Johnston, seconded by Mr. Carson: Whereas, James Anderson was released from being one of the sureties for the treasurer, and William Hanlon of Oxford accepted as surety for the treasurer in his stead. A new bond was duly executed, signed Murdoch Gair, John Lamerich, and William Hanlon, under the seals of said parties, and presented and received by the council."

There is no other evidence of Anderson having been released; and it is difficult to understand why the bond was completed by Gair and Lamerich executing it on the same day that this resolution was passed. Had this not been done, no liability would have attached, on the authority of *Toronto Brewing and Malting Co. v. Hevey*, 13 O.R. 64; because there is no doubt Anderson signed it only on the supposition and understanding that Gair and Lamerich would also sign it, but we have this strange state of things presented, viz., that previous to the completion of the bond he requested to be relieved; and, if the above resolution can be received as evidence, the council acceded to his request. I think he had a right to withdraw before the completion of the bond, and what took place between him and the reeve was tantamount to that: See *Offord v. Davies*, 12 C. B. N. S. 749; *Starrs v. Cosgrave Brewing and Malting Co.*, 12 S. C. R. 571, 594, per Gwynne, J.; *Burgess v. Eve*, L. R. 13 Eq. 450. And the council by its resolution afterwards, acquiesced in the withdrawal and accepted another surety in his stead.

According to the evidence, in my judgment, even if there was not a formal withdrawal on 27th December, no liability attached under any circumstances until the execution by Gair and Lamerich on the 17th January, 1887. On that day another bond, signed by the two last named and Hanlon, was accepted by the council by resolution in lieu of the one just before completed by the execution by Gair and Lamerich.

I think, therefore, that these plaintiffs are estopped from recovering on the bond of Anderson.

Another reason suggests itself to me. There is no doubt the plaintiffs hold the bond of Gair, Lamerich, and Hanlon for this same liability, and have brought an action and recovered judgment on it. It is quite clear Lamerich, when he signed the bond with Hanlon, did not intend, nor did the plaintiffs intend, that he should be liable on the Anderson bond also. If he is not, and I do not think it can be successfully urged that he is, then Anderson is

discharged on the bond signed by him, for the reason that both Gair and Lamerich, or at all events Lamerich, is relieved from all liability thereon.

On the whole case I have come to the conclusion that Anderson is not liable at all; and I therefore dismiss the action as against him, with costs.

As to the other defendants, these plaintiffs should not recover against them in this action for more than their costs incurred by reason of their allowing judgment to go against them by default, inasmuch as they have suffered judgment against them to go on the other bond given by them and William Hanlon in substitution for this bond. Therefore let the plaintiffs tax their costs against the defendants Gair and Lamerich, and have judgment for the amount against them.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

THE BRITISH AND CANADIAN LOAN AND INVESTMENT
COMPANY V. WILLIAMS.

Mortgage—Acquirement of equity of redemption by mortgagee—Release of mortgagor—Intention—Evidence of.

The defendant executed a mortgage on certain land to the plaintiffs, dated November 5th, 1881, to secure \$2,200, and interest, and on May 8th, 1882, conveyed the land to L. subject to the mortgage. On May 12th, 1883, L. conveyed to the plaintiffs. Afterwards the plaintiffs entered into an agreement with C. for the sale of the land to him for a sum less than the amount due them, which was followed by a conveyance to him. Subsequently the plaintiffs brought an action against defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L. when they took the conveyance from her was that defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them.

Held, that whether there was such an agreement or not it would not be binding on defendant, for he having sold to L. subject to the mortgage, it was L.'s duty to indemnify him against it, and plaintiffs took with knowledge of this and never communicated with him; and moreover by their subsequent sale to C. they put it out of the defendant's power to redeem.

North of Scotland Mortgage Co. v. Udell, 46 U. C. R. 511, and *North of Scotland Mortgage Co v. German*, 31 C. P. 349, commented on.

THIS was an action on a covenant contained in a mortgage, bearing date 5th November, 1881, made by the defendant in favour of the plaintiffs, to secure the payment of \$2,200, and interest. The plaintiffs claimed \$673.03 and interest from 18th December, 1885.

The principle defence, and the one relied upon, was set out out in these words: "After making of the mortgage in question, to wit, on the 8th May, 1882, the defendant conveyed the lands, subject to the said mortgage, to one Hester A. Lake; and, on or about the 12th May, 1883, the said Hester A. Lake conveyed the said lands to plaintiffs; and thereby the plaintiffs' claim upon the covenant contained in said mortgage became and was and is barred.

The plaintiffs, in reply, said: "That although the said Hester A. Lake executed and delivered to the plaintiffs a conveyance of the said lands, it was not the intention of the plaintiffs to accept, and the plaintiffs did not accept the

said conveyance in satisfaction and discharge of their claim on the mortgage against the defendant."

The cause was tried before Robertson, J., without a jury, at Toronto, at the Fall Assizes of 1887, who delivered the following judgment:

February 1, 1888. ROBERTSON, J.—The following facts came out in evidence, viz.: The mortgage was put in, as well as the deed of conveyance from defendant to Lake, bearing date 8th May, 1882, which on the face appeared to be a grant of the equity of redemption, subject to the mortgage mentioned. Also a conveyance of the same lands from Lake and her husband to the plaintiffs, bearing date 12th May, 1883, and registered 31st August, 1883. Also an agreement between the plaintiffs and one Joseph Cramer, for the sale and purchase of the said lands, bearing date 10th June 1884, for the price of \$2,100, payable as follows: \$50 down on execution of of agreement, \$450 on 1st April 1885, and the balance of \$1,600, to be paid in seven equal consecutive yearly instalments of \$228.56, each, together with interest, &c. Also a conveyance in fee of said lands from the plaintiffs to the said Cramer, bearing date 25th November, 1885,, consideration \$2,100. Also a mortgage from said Cramer and his wife to the plaintiffs on the said lands, to secure the balance of the purchase money, viz., \$1,950.

Also several letters which passed between R. H. Tomlinson, the plaintiffs' manager, and one T. G. Davis, their agent, at Napanee, on the subject of Mrs. Lake conveying to the plaintiffs her equity of redemption.

The first dated April 9th, 1883, is from the manager to the agent in which he says, after referring to the time being near at hand for spring work, and, unless the property is sold soon it will have to be leased for the season, &c. "If Mrs. Lake sees no way of selling or redeeming the property herself, she ought to make a conveyance of her interest in it to the company, so that she may not have to add the expense of a sale under Williams's mortgage to the already by far too heavy a claim.

Again the manager writes the agent on 14th April, 1883, "The best plan, it appears to me, would be for me to try and arrange a sale between Mrs. Lake and your customer, for the company's claim, that is, the purchaser to assume the mortgage, on the understanding that we are to re-arrange its terms, or reduce the interest to seven per cent. Failing in that, get the purchaser's very best offer and submit it, with your opinion thereon, for consideration. * * In the event of your not being able to effect a sale next week, I think it would be well to take a deed from Mrs. Lake and see what can be done in the way of letting the place for the season, &c., * * But by all means sell it this spring, if you can get an offer that you think the company ought to take. * * *By the way, what is the prospect of getting the deficiency (if any) out of Williams, or his son ?*"

In reply to this the agent wrote the manager 7th May, 1883: "I find that young Williams, (*i. e.* defendant Williams's son) is working W. A. Birchell's farm on shares. * * I think the balance might be got out of him, as he and his father gave the company a bond as collateral * * I have been endeavouring * * to comply with your wish * * I had several parties in view, with whom I expected to do something, and one of them came to time yesterday * * and made me an offer of \$2,000, \$500 or \$600 down * * . This is the best offer I have had. I think he means business, and I have agreed to give him an answer in a few days, &c."

In reply to this the manager writes on 8th May, 1883: "I am sorry to learn that you are unable to conclude a sale of this property to cover company's claim. I do not think that it would be advisable, under the circumstances, to accept the offer of \$2,000, as by so doing, without first offering this property for sale by auction, *we might be debarred from collecting balance from Williams and his son, &c.*"

And this kind of correspondence is carried on between the manager and agent until 24th December, 1884, after the sale by the plaintiffs to Cramer.

The agent Davis, in his evidence, said, "that when Mrs. Lake executed her deed, he told her that if her property when sold by the plaintiffs realized more than their claim, she should have her surplus, and the company would look to Williams for the "shortage."

The manager also swore that the company had no intention of releasing Williams when they accepted the deed from Mrs. Lake, &c.

Upon this state of matters, the plaintiffs ask for judgment against the defendants; and they make up their claim to be the amount mentioned, which is the difference between the amount due on their mortgage, and what they have sold to Cramer for. The defendant objects, and says there is a merger. I have carefully considered the authorities cited; and I am of opinion the defendant is entitled to judgment.

It was admitted by the plaintiffs' counsel on the argument that it was a question of intention, and that both parties must have so intended; and he urged that Mrs. Lake stood in the defendant's shoes, and that he was bound by any arrangement entered into by her with the plaintiffs.

In the first place, it was not proved to my satisfaction that there was any such agreement really entered into between Mrs. Lake and Davis; but, even supposing that there was such, I don't think that would be binding on defendant. He sold the property to Lake subject to the mortgage. It was her duty, therefore, to indemnify him against all claims thereon. The plaintiffs knew this, and they never put themselves in communication with defendant on the subject; besides that, after receiving the conveyance from Mrs. Lake, they sell and convey to Cramer, so that the defendant cannot now redeem—the property is gone beyond both his and the plaintiffs' reach.

I think the case of the *North of Scotland Mortgage Co. v. Udell*, 46 U. C. R. 511, is in point and in favour of defendant's contention; and that the other case cited by the plaintiff of *North of Scotland Mortgage Co. v. German*,

31 C. P. 349, does not help the plaintiffs. The facts there are quite different to what they are in this case; and I find that there was really no intention on the part of the defendant to hold himself responsible for the debt or any part of it. The equity of redemption was not merely assigned by the defendant to Mrs. Lake, to enable the plaintiffs more conveniently to sell; and I cannot understand how he can be bound by anything of the nature which took place between the plaintiffs and Mrs. Lake. I therefore dismiss the action with costs.

Judgment for defendant.

[COMMON PLEAS DIVISION.]

FORWARD V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Ice on sidewalk—Water running down lane in front of sidewalk and freezing—Evidence of negligence.

By reason of ice on the sidewalk on Yonge street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk; the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there.

Held, that there was no evidence of negligence on the part of the defendants.

THIS action was tried before Rose, J., and a jury, at Toronto, at the Fall Assizes of 1887.

It was brought against the defendants for negligence. The statement of claim was, "that on the 29th day of January, 1887, the plaintiff was walking northward along the east side of Yonge street, in the said city of Toronto, between five and six o'clock in the afternoon, when he fell down by

reason of a dangerous accumulation of ice on the sidewalk a short distance north of Queen street, caused by the negligence of the defendants in not removing the same after having been duly notified of the dangerous condition thereof."

At the close of the case the learned Judge submitted the following questions to the jury :

Q. What caused the plaintiff to fall? A. Ice.

Q. How long was the sidewalk in the condition in which it was at the time of the accident? A. Have no evidence to shew.

Q. Did the corporation know of the condition of the sidewalk at the place in question on the evening of the 29th January last? A. Yes.

Q. Was the corporation guilty of any negligence which caused the accident to the plaintiff? A. Yes.

Q. If so, what constituted such negligence? A. Allowing water from the lane to overflow sidewalk.

The jury assessed damages in favor of the plaintiff.

In Michaelmas Sittings, *Mc Williams* obtained an order *nisi* to set aside the verdict and judgment entered for the plaintiff, and to enter judgment for the defendants.

During the same sittings, December 12, 1887, *Robinson*, Q. C., supported the motion, and referred to *Burns v. Corporation of Toronto*, 42 U. C. R. 560, at pp. 575-6; *Bleakley v. Corporation of Prescott*, 12 A. R. 637; *Morrill on City Negligence*, 125-7.

J. K. Kerr and *J. R. Roaf*, contra, referred to *Goldsmith v. City of London*, 11 O. R. 26, 31; *Burns v. Corporation of Toronto*, 42 U. C. R. 560, 568; *Stilling v. Town of Thorp*, 54 Wis. 528; *Luther v. City of Worcester*, 97 Mass. 270.

February 11, 1888. GALT, C. J.—I have carefully read the evidence. There was no proof whatever of what may be called accumulation of ice at the place where the accident happened. It is quite true, as the jury have found, that the plaintiff fell by slipping on ice; but his own evidence

shews that the unfortunate accident was caused simply because on the afternoon of the 29th January the sidewalk was covered with ice. His evidence is as follows: "I went into Bollard's store. On coming out I turned round his corner to go north; and just as I got to the lane my foot slipped, and I tried to catch myself by catching hold of the window. I had in my hand my bag, and some things I bought, and I had my gloves on, and I could not get hold enough of the window, and I fell."

As respects the finding of the jury in answer to the third question, there was no evidence whatever to support it; and it is really in contradiction to their finding on the second question.

It appears to me (to quote the words of Gwynne, J., in the case of *Ringland v. Corporation of Toronto*, 23 C. P. 93, at p. 100,) that, "Unless the corporation could be held to be insurers of the safety of all persons using the sidewalk in the midst of our Canadian winter, I do not well see how they can be held responsible on this evidence."

The order must be absolute to enter judgment for the defendants, with costs.

ROSE, J.—The lane referred to in the findings of the jury runs between two stores which face westerly on Yonge street, on the east side, a little north of Queen—the whole space between the stores being thus occupied. The lane leads from Yonge street to livery stables, and is frequently used. The land slopes from the east towards Yonge street.

It was argued that the lane thus made, with its slope and walls, formed in some sense a conduit gathering the water from rain and melting snow and throwing it upon or over the sidewalk; and that therefore it became and was the duty of the city to provide some means to prevent the water flowing over the sidewalk, or to prevent the ice forming upon it.

The findings of the jury must, when read in the light of evidence and the charge, be taken to mean that the plaintiff slipped upon ice formed upon the sidewalk from water

which came from the lane: that there was no evidence to shew how long the ice had been upon the sidewalk; but that from the formation of the land, and the manner in which the walk was built, the city corporation must be taken to have known that the ice was there; and that it was the duty of the corporation to prevent the water flowing from the lane over the sidewalk.

The only ground of negligence on these findings is the not providing some means of preventing the water from the lane overflowing the side walk. It was suggested at the trial that this might have been done by having an opening or drain under the side walk, or a trap or opening in the lane east of the walk leading into a drain in the street. Such trap or opening would of necessity be the whole width of the lane.

It seems perfectly manifest that neither of these modes would be effective unless some one were employed to watch and keep them free from ice and snow; for when the snow falls the open spaces would be filled, and when the ice freezes all openings would at once be closed.

It was also suggested that the lane should have been kept free from snow so that no water would come from melting snow. This certainly would be effective; but the proposition is somewhat startling, that a municipal corporation can be compelled to keep free from snow all lanes opening into the streets over side walks, at the risk, if they fail, of actions for negligence in the event of the water from the melting snow forming ice upon the side walks.

And, if this were done, it would still leave unprovided for the flowing water from rain falling on the lane, and naturally running down upon the walk and forming ice, a fruitful source of danger at not infrequent periods of the winter months.

To permit this verdict to stand would in effect be to declare that wherever the corporation build sidewalks in front of lanes, or carriage ways, where the land sloped towards the street, or indeed in front of any land sloping towards the street, it at once became burdened with the duty of

preventing water running from such higher land upon the walks and forming into ice, or with the duty of without delay removing such ice, although it had no notice of its formation other than the notice derived or imputed from the formation of the land and the building of the walk. To declare such to be the law, would be to bind upon municipalities burdens hard to be borne, and to require of them the performance of a duty which they might well declare to be impossible.

I feel a natural sympathy with the plaintiff who was much injured, and whose manner of giving evidence impressed me very favourably; but I must not be kind to him at the expense of the defendant corporation.

I agree that the order must be made absolute to set aside the verdict and enter judgment for the defendant corporation, dismissing the action, with costs.

MACMAHON, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

BRUNELL V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Master and servant—Railways—Accident—Negligence—“Workmen’s compensation for Injuries Act—49 Vic. ch. 28, sec. 3, sub-sec. 5 (O.)

B., the plaintiff’s son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he also was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants’ officials it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under “The Workmen’s Compensation for Injuries Act,” 49 Vic. ch. 28, sec. 3, sub-sec. 5 (O.)

Held, that the defendants were not liable.

THIS was an action tried before Armour, C. J., without a jury, at Port Arthur, at the Summer Assizes of 1887.

It was brought by a father to recover damages for the death of his son.

The son was employed as fireman on a locomotive, on which there was an explosion of the boiler, which caused the accident. The engine was in charge of an engineer named Rumsey, and the deceased was under his orders.

There was no direct evidence of witnesses who were present at the accident as to its cause; but there were several who stated that it was to be ascribed to the fact that the water in the boiler had been allowed to run too low, and that the sudden influx of cold water into the boiler caused the explosion.

The learned Chief Justice held as follows: “I find that the explosion, which caused the death of Brunell, was the result of negligence. I find that W. J. Rumsey was the driver, and the deceased the fireman of the locomotive engine at the time of the explosion. I find that Rumsey the

driver was in charge of the engine at the time of the explosion; and that the fireman was under his orders, and was acting as his assistant as was his duty under these circumstances. And, without other evidence, I think the presumption is that the negligence was that of Rumsey: that the negligence must be ascribed to him because he was in charge. If I am right in this, the presumption is that the deceased was using ordinary care; and the onus is cast upon the defendants of rebutting this presumption, which they have not done, as I find."

In Michaelmas Sittings, 1887, *G. T. Blackstock* moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

In the same sittings, *G. T. Blackstock* supported the motion, and referred to *Wakelin v. London and South-Western R. W. Co.*, 55 L. T. N. S. 708; 12 App. Cas. 41; *Thomas v. Quartermaine*, 18 Q. B. D. 685; 49 Vic. ch. 28 sec. 3, sub-sec. 5 (O.)

J. K. Kerr, Q.C., and *Carson*, contra, referred to *Hetherington v. North Eastern R. W. Co.*, 9 Q. B. D. 160; *Weblin v. Ballard*, 17 Q. B. D. 122; *Thomas v. Quartermaine*, 17 Q. B. D. 414; *Holmes v. Clarke*, 6 H. & N. 349; 7 H. & N. 937; *Howe v. Finch*, 17 Q. B. D. 187; *Baddeley v. Earl of Granville*, 19 Q. B. D. 423; *Cox v. Great Western R. W. Co.*, 9 Q. B. D. 106; *Matthews v. Hamilton Powder Co.*, 14 A. R. 26; *Rudd v. Bell*, 13 O. R. 47.

February 11, 1888. GALT, C. J.—The action (as stated by Mr. Carson) is brought under sub-sec. 5 of sec. 3 of 49 Vic. ch. 28 (O.) That section and sub-section are as follows: 3. "Where, after the commencement of this Act, personal injury is caused to a workman * * 5. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal points, locomotive, engine or train upon a railway; the workman, or, in case the injury results in death, the legal personal representative of the workman and any persons

entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of and in the service of the employer, nor engaged in his work."

The only witness called by the learned counsel for the plaintiff was the plaintiff himself, and his evidence has no bearing on the point now under consideration. But the learned counsel put in evidence several statements made by officers of the company to prove the employment of the unfortunate young man and of the engineer in charge. He also put in a report made by an officer, named Wishart, who was examined on behalf of the defendants. Mr. Wishart, in reply to the question, "Have you any knowledge of the circumstances, or has any other officer of the company, so far as you are aware, any knowledge of the circumstances except from hearsay? A. What Rumsey told me himself? Who was he? A. The driver."

The report was as follows: "On December 27th, driver W. J. Rumsey left Schrieber for Fort William about 9.35 p.m. with engine 269 on Demar's freight special. After passing Gravel River station, driver Rumsey remarked to his fireman H. Brunell, that he was carrying too much water, and to ease off the pump; this was done. Previous to this, water glass was examined and found working properly; and when about two and a-half miles east of Nepigon, fireman H. Brunell said to driver Rumsey, that the pump was not working very well. Driver Rumsey at once applied his injector; and fireman Brunell started to put a fresh fire on. Whilst in this act, the crown sheet fell with a loud report, blowing the smoke box door off, a great rush of steam coming from inside of the fire box seriously scalded fireman H. Brunell."

This is the only account of the accident. Several witnesses were called, who proved that, although the company held the driver responsible in all respects as regards the engine, yet that it was the duty of the fireman to attend to the supply of water: that the knowledge of what was necessary as respects that supply was part of what may be called his education to qualify him for the superior position of a

driver ; and that moreover he had from his position on the train greater facilities for opening the valve than those possessed by the driver. It is plain also from the above report, which was put in by the plaintiff, that this very question was that discussed by the driver and fireman immediately before the accident.

It will be observed that the learned Chief Justice in his finding has not found that in truth the negligence was that of the driver ; but that, under the circumstances, the negligence should be attributed to him ; and therefore the defendants are liable.

There can be no question as to the correctness of that finding, if this were a case in which any workman other than the fireman was concerned ; but, in my opinion, bearing in mind the undisputed testimony of the witnesses as to the duties of the fireman, it is not applicable to the present action.

There can be no doubt that it is the duty of the fireman to attend to the supply of water ; and, suppose him to neglect that duty, in case both he and the driver were killed, then, if the finding of the Chief Justice be correct, the company would have no defence. It appears to me therefore, that before an action like the present can be sustained there must be some evidence of a direct neglect of duty on the part of the driver ; and that it must not be inferred, as regards a fireman, that because an accident happened it must be attributed to the neglect of the driver without any evidence to shew that it might not have occurred through the neglect of the fireman.

ROSE, J.—A fair test of the plaintiff's right to recover may be to consider what would be his right were the engineer, Rumsey, the defendant, instead of the company.

As the plaintiff has put in and relied upon the report of Wishart, the locomotive foreman, based upon Rumsey's statement, it is only fair that the whole of Rumsey's statement should be considered.

I say nothing, therefore, as to the propriety of admitting such statements as evidence of the facts, as to which I should desire to consider with greater care before coming to the conclusion that they were evidence. The plaintiff certainly has no right to object to the whole of the statement going in if a portion be admitted at his instance.

Under the statute, 49 Vic. ch. 28, sec. 3, sub-sec. 5, (O.), the plaintiff's right to recover is as if his son had not been in the service or employment of the defendant company. No question arises as to the application of the maxim *volenti non fit injuria*, discussed in *Thomas v. Quartermaine*, 18 Q. B. D. 685, for here the injury happened from a cause attributable to the negligence of either Rumsey—to the risks of which it could not be said that Brunell willingly submitted himself—or of Brunell himself, where manifestly the maxim would not apply.

If Rumsey had been the defendant the plaintiff's complaint would have been that he (Rumsey) caused the death of the plaintiff's son by negligently allowing the water to get low in the boiler, and then negligently turned on cold water, causing the explosion.

We may assume that the answer would have been that as to the first there was no negligence, for the duty of watching the height of the water in the boiler was delegated to and accepted by the deceased; and, as to the latter, there was no negligence, as he (Rumsey) turned on the cold water at the request of the deceased, who either knew the water had been allowed to become too low, or would have known had he been doing his duty, or had not something occurred which, without negligence, prevented his knowing.

We must first consider the evidence of negligence against Rumsey. It amounts simply to this:

1. That there was an explosion.
2. It is assumed that this would not have occurred without the negligence of the person in charge of the engine.
3. That Rumsey was in charge of the engine.

It may be that all these grounds have been established, and that had the plaintiff rested his case upon giving evidence of the explosion, and that Rumsey was the engineer in charge of the engine, the finding of the learned Chief Justice would have been unassailable.

The statements of Rumsey having been introduced, what appears from them and the other evidence offered?

That Brunell had been the fireman on this engine for at least a year—as I gather from the evidence of Wishart—while it was Rumsey's first trip on her: that after making a couple of trips a fireman would be able, under the eye of the driver, to regulate the water, and would become quite competent in four or five months: that it is customary on all railways for the fireman to take charge of the water in the engine, being allowed to do so by the driver in order to gain experience so that he himself may become a driver: that in actual practice it is the duty of the fireman to look after the water: that the master mechanic of a road would hold both the engineer and the fireman equally responsible for an accident arising from the water being allowed to become low, and in case of failure both would be discharged; and, if the fireman wanted to prevent the water becoming low and the engineer would not let him, the fireman's duty would be to report the engineer, failing which, he would be held responsible: that in this particular engine the pump was on the fireman's side, and was very simple, so that the fireman had a decided advantage in seeing it.

It further appeared that in this case the fireman had been attending to the water: that Rumsey told him he was carrying too much, and to ease off the pump, which was done: that previous to this the water glass had been examined and found to be working properly; but when about two and a-half miles east of Nepigon Brunell said to Rumsey that the pump was not working very well; Rumsey at once applied his injector and Brunell started to put a fresh fire on when the accident occurred.

It was also stated by Wishart that in examining the water

glass or guage cocks one might open and shut both cocks to see if the water was low, and in doing so there is a possibility of opening the upper one and shutting it close, and opening the lower one and causing the water to rise and shew a full glass of water; and, if this were done, the engineer looking across from his side, would be deceived.

It is clear from these statements that Brunell had charge of looking after the water, for he reported to Rumsey that the pump was not working well, *i. e.* that the water was getting low, practically requesting him to turn on water by applying the injector. He therefore had knowledge of the exact quantity of water, and should not have allowed the cold water to be turned on; or he had not such knowledge, either through his own negligence, or through his unskilful handling of the guage cocks.

It seems to me it was as follows :

1. Both Brunell and Rumsey knew that the water was low when Brunell reported that the pump was not working well, and both assented to the cold water being turned on; or

2. That Brunell knew, but Rumsey did not; in either of which cases the plaintiff could not recover.

I cannot on this evidence come to the conclusion that it has been clearly shewn that the negligence was solely Rumsey's. The most that can be said is that it is not clear whether the negligence was his or Brunell's.

Brunell having been shewn to have been in charge, and with greater facilities for acquiring knowledge, it cannot, I think, be assumed that he was free from blame, and that his death was attributable to Rumsey's negligence; and so, I think, the plaintiff fails.

It would certainly be much more satisfactory if we had the evidence of Rumsey taken on oath. I doubt, however, if it would assist the plaintiff.

The order *nisi* must be made absolute, with costs.

MACMAHON, J., took no part in the judgment, not having been sworn in as a member of the Court, until after the case had been argued.

[COMMON PLEAS DIVISION.]

ARNOLD V. CUMMER.

Limitations, statute of—Entry by owner—Life lease to one of several in possession—Effect of.

In 1860 D. M., the then owner of certain lands, conveyed to A., who in 1861 conveyed to N., through whom plaintiff claimed. D. M. continued in possession, and, at his request, his sister M. B. came and resided with him, and took charge of the house and their sister S. M., who was subject to fits, which to some degree affected her mind. In 1862 D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868 defendant, the sisters' nephew, came to reside with them, M. B. giving him charge of the place, upon which he subsequently erected buildings. In 1875 N. went upon the land in assertion of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favour of M. B. and S. M., which was accepted by S. M., who executed the lease, but not by M. B., who refused to do so: S. M., M. B., and defendant still continuing to reside on the premises. M. B. died in 1879 and S. M. in 1886. The defendant continued to reside thereon. In 1887 the plaintiff brought ejectment against defendant, who claimed a title by possession.

Held, that N. having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and his successors in title; and, therefore, plaintiff was entitled to recover.

THIS was an action brought to recover possession of part of the north-east half of lot No. 6 in the 1st concession, on the river Thames, in the township of Chatham, containing 55½ acres.

The plaintiff claimed as the owner in fee.

The defendant, in his statement of defence, disclaimed any right to the land mentioned in the statement of claim, except to one-quarter of an acre on which was situated his house and stable; and, as to that, he claimed by possession for over twenty years; and said that in the *bond fide* belief that he was the owner, he had planted forest trees, and erected buildings thereon, and permanently improved the said land; and that should it appear he had no title, he claimed the benefit of the improvements under sub-sec. 29 and 30 of ch. 51, and sec. 4 of R. S. O., ch. 95.

The action was tried before Rose, J., without a jury, at Chatham, at the Fall Assizes on the 6th of October, 1887, who delivered the following judgment.

ROSE, J.—At the hearing, I found as facts that David McKergan had requested his sister, Mary Barnes, to come and reside with him and take charge of the house and their sister, Sarah McKergan, who was then, and continued to be an invalid or subject to epileptic attacks, which, to some degree, affected her mind: that at his death, about twenty to twenty-five years ago, the two sisters remained on the property, Mary taking charge and control: that in 1868 the defendant, a nephew of the sisters, at the request of one or both of them, came on the place to reside with them, and has resided there ever since: that subsequent to his going there, Mary Barnes gave him charge of the place; and that he subsequently erected buildings and retained control. Mary died about eight years ago; and Sarah about August, 1886.

I also found that when Northwood, the then owner of the land, executed a life lease at a nominal rental in favor of the two sisters, Mary never accepted the lease, but Sarah did, and executed it. I thought that Mary never became tenant to Northwood or any subsequent owner.

Apart from the lease, which I understood was executed on the land in question at the residence of the sisters, there never has been any entry upon the land by any owner since David's death; and, if the lease does not save the title to the plaintiff, then the defendant is entitled to retain possession, more than ten years having elapsed since any owner of the land was in possession.

No rent was ever paid under the lease. It was for the lives of the tenants, and only one cent a year reserved. The non-payment of rent of course does not affect the title of the landlord.

On the authority of *Reading v. Royston*, 2 Salk. 423, and *S. C.*, 2 Ld. Raym. 829; *Fraser v. Fraser*, 14 C. P. 70; *Canada Permanent Loan and Savings Co., v. McKay*, 32 C. P. 51; *Williams v. Potts*, L. R. 12 Eq. 149, 151, I think the right of Northwood, as lessor under the lease,—to say Sarah McKergan, prevented the statute running against him or his successors in title.

When he went on the premises, executed the lease, and obtained the acceptance by Sarah McKergan, it was, as it seems to me, as if he then made entry; and, therefore, remained on the premises during her lifetime. If so, then from the above cases it would appear clear that, although Mary Barnes and the defendant remained with Sarah McKergan, the possession would be Sarah's and not theirs.

In *Reading v. Royston*, it is thus said in 2 Salk. 423: "The Statute of Limitations never runs against a man, but where he is actually ousted or disseized, * * and where two men are in possession, the law will adjudge it in him that hath the right. A man may be tenant in common by prescription, yet he may not be tenant in common by wrong: nor can a man be disseized of an undivided moiety."

The same case is reported in 2 Lord Raym., p. 829, as *Reading v. Rawsterne*; and there it is said: "B. and D. were not tenants, for B. was a mere stranger; and though he took a moiety of the profits, that will not make him tenant in common, for a man cannot disseize another of an undivided moiety, as he may of such a number of acres. * * For if A. seized of land makes a lease of one undivided moiety and J. S. ousts the lessee, he must bring his ejectment for a moiety; so if they were both put out of possession, they must have several remedies as several assizes, &c."

The other cases above cited all refer to and follow *Reading v. Rawsterne*.

If Northwood had gone into possession when the life lease was made, and remained in jointly with Mary Barnes until her death, it is clear Mary would have had no title by prescription against him; and so being in possession by his tenant she had no title by prescription; and the defendant can have no higher right for the same reasons.

I think the plaintiff shewed a good paper title, beginning with the possession by David McKergan, for a period beyond the memory of the witness, whose memory carried him back over fifty, and possibly quite sixty years. David McKergan remained in possession, probably from 9th July, 1816, the date of his deed, until he conveyed to Mary A. Anderson, in 1860, and she conveyed to Northwood through whom the plaintiff claims.

The plaintiff must have judgment for possession of the land. He was willing the defendant should take off the buildings which he apparently conceded he had a just claim to. If the plaintiff retain the buildings, he probably will not ask for costs. If the defendant is permitted to remove them, the plaintiff must have his costs.

As to this question, if counsel cannot agree, they may may speak to me before judgment is entered.

In Michaelmas Sittings, 1887, *Atkinson*, Q.C., for the defendant, moved on notice to set aside the judgment for the

plaintiff, and for an order directing judgment to be entered for the defendant on the following grounds:

1. That the judgment is contrary to the law and evidence and weight of evidence.

2. That no entry in law sufficient to oust the defendant or Mary Ann Barnes, or to enable Joseph Northwood to create an entry and possession in himself through Sarah McKergan either as co-tenant with them, or as against the possession and the title by possession in them ripening, became vested before the commencement of this suit.

3. That the lease put in evidence from the mental condition of Sarah McKergan, and the proceedings as to its alleged execution by Sarah McKergan, was void as to her, and on the facts inoperative to oust the defendant or Mary Barnes of their possession, or to create a co-tenancy with them on said land.

At the same Sittings, *Atkinson*, Q. C., supported the motion, and referred to *Doe d. Baker v. Coombes*, 9 C. B. 714; *Dixon v. Baty*, L. R. 1 Ex. 259; *Richardson v. Young*, L. R. 10 Eq. 275; *Canada Co. v. Douglas*, 27 C. P. 339.

Pegley, contra, cited *Canada Co. v. Douglas*, 27 C. P. 339; *Roan v. Kronsbein*, 12 O. R. 197.

February 11, 1888. MACMAHON, J.—The first question to consider is, when did the defendant, Cummer, get possession? for in order to enable his title to ripen, the defendant must have been in and the plaintiff out of possession.

Did the defendant obtain an entry prior to Sarah McKergan's death? and, if so, when and in what manner was the entry effected?

David McKergan being in possession for a length of time, sufficient (according to the finding of the learned Judge who tried the case) to give him a possessory title, conveyed in June, 1860, the whole of this lot 6, containing 200 acres to Mary Ann Anderson; and, in May, 1861, Mary Ann Anderson conveyed to Andrew Northwood, through whom the plaintiff by *mesne* conveyances claims. David

McKergan had remained in possession of the land until his death.

According to the findings David McKergan died twenty or twenty-five years before the trial, so that he died between 1862 and 1867. Mary Barnes died about eight years prior to the trial; and Sarah McKergan died about August, 1886.

This action was commenced on the 7th of April, 1887.

In 1875, Andrew Northwood, the owner of the fee, went upon the land in assertion of his rights as owner, and found Mary Barnes and Sarah McKergan in possession of the premises in dispute. He had, prior to his entry, threatened to bring ejectment, but was induced by Samuel Arnold to give a life lease of this one-half acre to Mary Barnes and Sarah McKergan; and a lease was accordingly prepared and executed on the land by Northwood and Sarah McKergan,—Mary Barnes refusing to execute.

It was urged very strenuously by Mr. Atkinson that this was not a sufficient entry by Northwood and ouster of Mary Barnes to prevent the possession claimed by Mary Barnes from ripening into a title.

In *Cole* on Ejectment, p. 68, it is said: "Actual entry with sufficient title changes the legal possession in an instant: *Randall v. Stevens*, 2 E. & B. 641; *Davis v. Burrell*, 10 C. B. 821. The reason for this is well explained by Maule, J., in *James v. Chapman*, (in error) 2 Ex. 803, 820, as follows: 'I agree with the exception of the plaintiff in error, that the question raised by the issue of not possessed is whether the plaintiff was in *actual possession* or not; but it seems to me, that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of the right of possession, and, if the question is which of these two is in actual possession, I answer, the

person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects. You cannot say that it is a *joint* possession ; you cannot say it is a possession as tenants in common. It cannot be denied that one is in possession, and the other is a trespasser. Then that is to be determined, as it seems to me, by the fact of the *title*, each having the same apparent actual possession : the question as to which of the two really is in possession, is determined by the fact of the possession following the title. There are many other authorities to the same effect, but none in which the law is so clearly laid down. * * Immediately upon entry the party is by law remitted to his previous estate, (that is to say, he becomes seized or possessed of the land for such an estate therein, (if any) as was legally vested in him before and at the time of the entry : * * *Taylor ex d. Atkyns v. Horde* 1 Burr. 114 id. 90 ; *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608, 632 ; 2 H. L. 811 ; *Spotswood v. Barrow*, 5 Ex. 100, 113."

Apply the law as laid down by Maule, J., in the passage quoted from *Jones v. Chapman*, to what was done by Northwood in this case. He did all that was requisite in order to obtain legal possession. He had the legal title, and entered upon the land in assertion of his rights as owner, then *eo instanti* the actual possession was changed and was vested in him. See also as to change of possession : *Henderson v. Harris*, 30 U. C. R. 360 ; *Canada Co. v. Douglas*, 27 C. P. 339.

Northwood having entered and taken actual possession, places Sarah McKergan as his tenant under him ; and, as such tenant under the life-lease in her favor, her possession was the possession of Northwood and his successors in title during her life-time.

Northwood having the legal title, and by his entry in 1875, having obtained actual possession and continued it through his tenant, Sarah McKergan, the other persons who were there—Mary Barnes and Cummer, the defendant, were trespassers.

If any authority were required for the proposition that the possession of the agent is the possession of the principal, and that a tenant is such agent, it is found in the case of *Williams v. Potts*, L. R. 12 Eq. 149, cited by Mr. Justice Rose, in his well considered judgment.

On the facts and the law applicable to the facts, the defendant could not obtain an entry until after the death of Sarah McKergan in August, 1886.

The motion of the defendant must be dismissed, and the judgment of his lordship, Mr. Justice Rose, affirmed.

GALT, C. J., and ROSE, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

MCGILL V. WALTON.

*Malicious prosecution—Reasonable and probable cause—Evidence of—
Non-statement of full facts to solicitor and police magistrate.*

The plaintiff at Brantford having corresponded with the defendant at Hamilton, as to purchasing ice, defendant on 7th September, notified plaintiff by telegram that the ice would not be sent unless plaintiff telegraphed money to cover freight and ice, to which plaintiff answered that the money was paid to the express company, and to send a full car, which was done. No money had, however, been paid to the express company. On 9th September, defendant telegraphed defendant asking what he meant. The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to plaintiff on the following day. The plaintiff had, on 9th September, deposited \$30 with a bank in Brantford to defendant's credit, supposing it would be transmitted to defendant, which was not done. On 1st October defendant wrote plaintiff that unless he sent the full amount of account defendant would have to take criminal proceedings. On 7th October, the defendant not having received a reply from plaintiff, consulted his solicitor, who, defendant said, advised that plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, laid information before the police magistrate, who issued a warrant under which plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank, was proved to be true, whereupon the magistrate stated that there was no ground for the arrest, and dismissed the case. In an action for malicious arrest, the jury found that the defendant believed the plaintiff had not deposited the money with the express company or with the bank, but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate.

Held, [reversing the judgment of CAMERON, C. J., at the trial] under the circumstances, there was a want of reasonable and probable cause; and the plaintiff was entitled to recover.

THIS case was tried before the late Sir M. C. Cameron, C. J., at the Brantford Spring Assizes, 1887.

It was an action for malicious arrest, by causing the plaintiff to be arrested on a charge of having, by false pretences, obtained from the Walton Ice Company, on the 8th and 11th of September, 1886, two car loads of ice of the value of \$48, with intent to defraud.

The plaintiff carried on business in Brantford as a manufacturer of ginger beer, and an ice dealer; and the defendant was an ice merchant at Hamilton.

The material facts necessary to be considered were, that in August, 1886, the plaintiff desiring to purchase ice applied to the Walton Ice Company of Hamilton for prices, and was furnished with the figures at which it would be sold F. O. B. at Hamilton—in addition to which the ice company required prepayment of the freight before shipment.

On the 7th September the plaintiff ordered from the ice company, by telegram, a car load of ice, desiring the company to draw at sight on Friday. On the same day the manager of the ice company telegraphed the plaintiff: "Will ship car to-morrow evening."

From the evidence it appeared the defendant was not in Hamilton on the 7th, when the plaintiff's order was received, and the answer sent; but on the following day he communicated with the plaintiff by telegraph, saying: "Telegraph money to cover freight and ice, if you want car to-night." And the plaintiff replied by telegraph: "Money paid express company. Send car full at once; one car for Saturday." No money had been paid by the plaintiff to the express company; and on the 9th of September, the ice company telegraphed the plaintiff: "No money by express; what do you mean; answer immediately." To which the plaintiff replied on the 10th: "Paid bank yesterday; send car for Monday morning." On the following day the ice company, as the defendant alleged, relying upon the representation contained in this telegram, shipped another car load of ice to the plaintiff.

It appeared the plaintiff had, on the 9th of September, deposited to the credit of the defendant, in the agency of the Standard Bank in Brantford, the sum of \$30, which the plaintiff supposed would be transmitted in some way to the Walton Ice Company; but the amount was not remitted by the bank to the ice company.

On the 1st of October the defendant, prior to consulting his solicitor, wrote the plaintiff the following letter:

“ROBERT H. MCGILL, Esq., Brantford.

“SIR,—

“It looks to me that you have been practicing a little sharp upon us; but, unless you send us the full amount of the account which I have enclosed, on or before Thursday, the 7th October, I shall know this is a case of fraud, as you got the ice under false pretences by telegraphing and writing that the money was paid into the express office, so we may depend we have a criminal action against you, but don't want to put you into this serious shape; if we do, it would only be your own fault; but we must do this, unless the money is paid before or on the 7th October. I have charged you \$1.15 for the two cars instead of \$1.05, as the price quoted you twenty cars and not two.”

Not receiving a reply to this by the 7th of October he consulted his solicitor, who, the defendant said, advised him that the plaintiff had been guilty of a criminal offence, and advised his arrest; and on the 22nd November the defendant went to Brantford and laid an information before the police magistrate, who issued a warrant under which the plaintiff was arrested in a public house in the city, and brought before the police magistrate.

On appearing before the magistrate, the plaintiff stated that the representation made by him in his telegraph of the 10th September was true, and that the money had been deposited in the Standard Bank. The plaintiff was allowed to go to the bank in charge of the constable, by whom he had been arrested, where it was found that the sum of \$30 had been deposited there to the defendant's credit; and on the magistrate being informed of this, he advised there was no grounds for the plaintiff's arrest; and the case was dismissed.

The Chief Justice indorsed upon the copy of the pleadings the findings of the jury as follows:

“The jury find that the defendant shipped ice to the plaintiff upon a contract that the ice should be paid for by the plaintiff before the same was shipped. (2) That the plaintiff represented to the defendant that the money for the ice had been paid to the express company. (3) That the said representation was untrue. (4) That the defendant, relying upon the said representation, shipped the ice to the plaintiff. (5) That the defendant consulted his soli-

citor, who advised him upon the facts represented to him, that the plaintiff had been guilty of obtaining the ice by false pretences; but it was doubtful whether the defendant did represent the facts truly to the solicitor. (6) In answer to the question, did the defendant truly represent to the police magistrate the facts, and did the police magistrate advise him on these facts, that the plaintiff had obtained the ice by false pretences? the jury answered, "no." (7) They found further that when the defendant represented to the police magistrate, that the plaintiff had not paid the money to the express company, he really believed the plaintiff had not deposited the money with the express company, or with a bank. (8) The defendant had not reasonable grounds for so believing. (9) The defendant did not take reasonable means, or make reasonable efforts to ascertain whether the defendant had paid the money into the express company, or into the bank. (10) That the defendant acted maliciously in laying the information; and they assessed the plaintiff's damages, if he should be entitled to damages, at \$40.

On the above findings the Chief Justice said: "Having regard to the evidence, I am of opinion there was reasonable and probable cause for the defendant laying the information in the statement of claim alleged, and direct that the plaintiff's action be dismissed, with costs, to be paid by the plaintiff."

In Michaelmas Sittings, 1887, *McCarthy*, Q.C., moved on notice for an order to set aside the verdict and judgment entered for the defendant, and to enter a verdict and judgment for the plaintiff, on the ground that upon the findings of the jury the plaintiff was entitled to judgment; and that said verdict and judgment were against law and evidence.

In the same sittings, *Teetzel*, for the defendant, obtained an order *nisi* to shew cause why the findings of the jury to the second part of the 5th question, the 6, 8, 9, 10 and 11th questions should not be struck out and set aside; and for a new trial in the event of the judgment of the late

Chief Justice, in favor of the defendants being reversed and set aside, upon the ground that the said findings were against evidence, and the weight of evidence, and contrary to the charge of the learned Chief Justice.

During the same sittings *McCarthy*, Q.C., supported the order, and referred to *Young v. Nicholl*, 9 O. R. 347, 359; *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152.

Teetzel, contra, referred to *Lister v. Perryman*, L. R. 4 H. L. Cas. 535, 538.

February 11, 1888. MACMAHON, J.—The question for our consideration is, whether, upon the evidence and findings of the jury, the late learned Chief Justice was right in the conclusion he arrived at, that the defendant had reasonable and probable cause for laying the information against the plaintiff.

Reasonable and probable cause is thus defined by Hawkins, J., in *Hicks v. Faulkner*, 8 Q. B. D. 167, at p. 171: "I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation, so to believe; fourthly the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, and the reasonableness of such last-mentioned belief,

are questions of fact for the jury whose findings upon them become so many facts from which the Judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; and the Judge is to draw it from all the circumstances of the case: *Lister v. Perryman*, L. R. 4 H. L. 535, 538, per Lords Chelmsford and Westbury. This inference is certainly not to be interfered with upon lighter grounds than if it had been entrusted by law to the jury."

Every judicial Act of the late learned Chief Justice who tried this case is entitled to the highest consideration by the Court; and we ought not to set aside his findings in the favor of the defendant, unless the evidence and the findings of the jury leave the Court no other alternative.

In considering the evidence and findings of the jury, the Court has to decide whether, in the light of the decisions, the late Chief Justice was right in reaching the conclusion he did, that the defendant had reasonable and probable cause for acting as he did. And that brings us to the question whether the defendant acted with reasonable care; or, what is the same thing, did the defendant act as a reasonably cautious man would have acted in endeavouring to inform himself of those facts with which he might have made himself familiar before swearing to the information?

Brett, M. R., in his judgment in *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 440, at pp. 450-1, says: "It has been decided that the question whether reasonable care has been taken by those who instituted the proceedings to inform themselves of the true state of the case, must be determined one way or the other, in order to enable the Judge to give his opinion. Therefore, it becomes a necessary part of the question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts. The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case is not merely a piece of evidence

to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove or disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause. It is one of those facts for which I have tried to find a proper designation, but I have not succeeded in finding any satisfactory to my mind ; it may be described as a "fundamental" fact, in order to try to distinguish it from a fact which is merely evidence of something else. It is a fact which it would be necessary to allege and prove."

According to *Abrath v. North Eastern R. W. Co.*, the *onus* of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff. A "fundamental" fact necessary to be proved, was that reasonable care had not been taken by the defendant to inform himself of the true state of the facts.

Although the jury found that when the defendant represented to the police magistrate that the plaintiff had not paid the money to the express company, he really believed that the plaintiff had not deposited the money with the express company or with the bank, they also find that the defendant had not reasonable ground for so believing ; and that he did not take reasonable means or make reasonable efforts to ascertain whether the plaintiff had paid the money to the express company or to the bank.

If these findings of the jury are supported by the evidence, then the want of reasonable and probable cause on the part of the defendant is established : because, to use language of Brett, M. R., "if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case then there must be a want of reasonable and probable cause."

On his examination in chief at the trial the defendant was asked as to visiting Brantford on the 10th of Septem-

ber—two days after the first car load was shipped—and he gave the following evidence regarding his interview with the plaintiff on that day :

Q. Then did you go to Brantford after that? A. Yes, sir. Q. How long after the 8th September did you go to Brantford to make the enquiry? A. I think it would be on the 10th—the morning of the 10th. Q. You found there was no money in the express office here? A. I went to the express office and enquired, and there was no money there paid by McGill or for me. Q. Or by any one else on his account. And when do you say you shipped the ice? A. On the evening of the 8th. Q. After receiving that telegram, when you came to Brantford did you see the plaintiff again on the 10th? A. Yes. Q. What did you say about it, and where did you meet? A. I met him down near the old Great Western station on the street. Q. And what took place between you and him? A. He told me he had sent the money to the bank. Q. Did you believe that; did you believe what he said at that time? A. I don't know just exactly what I thought; possibly it might be there. Q. So you went back to Hamilton? A. Yes, sir. Q. Did the money come to you? A. No, sir. Q. You never received it up to the time of this arrest? A. No, nor for sometime afterwards. A. And then you got this telegram, this was sent on the 10th September; do you know when that would be sent? A. It was home when I got home. Q. He had sent it apparently before he had seen you on the 10th? A. He told me he had sent it. Q. He had already got the one card? A. Yes, sir. Q. And he says here, paid to bank yesterday; send car for Monday morning. Now did you send another car on receiving that telegram? A. I am not just positive how that was; he got another car though on the Saturday night.

On cross-examination the defendant was asked regarding his visit to Brantford on the 22nd November, for the purpose of prosecuting the plaintiff, and on which day the information was sworn to, and the warrant issued. The defendant stated as follows :

Q. And then did you come up here for the express purpose of prosecuting the man at that time? A. I did. Q. Did you go to see him first? A. No. Q. Then from the time you had seen him here in Brantford and he told you he had put that money in the bank and that he had telegraphed to you that he had done so you never saw McGill until after he was arrested? A. No. Q. You never took the trouble of going to McGill and asking for an explanation of what bank that was? A. No, I had written to him. Q. No. We have got your letters here. A. I did write to him. Q. Where is the letter? A. I have not got a copy of it. It was one I wrote myself. Q. Why didn't you keep copies? A. That was a letter I wrote myself after business hours and I did not keep a copy of it. No doubt he has got the letter.

The defendant on the 10th of September was informed personally by the plaintiff that the money had been paid

into the bank on the previous day, and a telegram to a like effect had on the same day been despatched to the defendant at Hamilton, yet when the defendant goes to Brantford on the 22nd November, although he could, by going a few hundred yards, have seen the plaintiff, and ascertained beyond doubt where the plaintiff had deposited the money which he represented had been placed in the bank, he does not take the reasonable precaution which a careful and prudent man should have taken. So that the jury were fully warranted by the defendant's own evidence in finding as they did, that there was a want of reasonable care on the defendant's part to inform himself of the true state of the case prior to causing the plaintiff's arrest.

A few moments after the plaintiff's arrest the fact that the money was in the bank to the defendant's credit was ascertained, and this information could have been procured with equal facility a few minutes prior to the arrest.

The defendant cannot shield himself behind the advice given by his solicitor, for although, on the facts submitted by the defendant to his solicitor, the latter advised him that the plaintiff had been guilty of obtaining the ice under false pretences, the jury say it was doubtful whether the defendant did represent the facts truly to his solicitor. The jury also find that the defendant did not truly represent to the police magistrate the facts; and therefore any advice given by the magistrate could not, under these circumstances, afford any protection to the defendant.

Applying the law to the evidence and the findings of the jury, the verdict and judgment entered by the late learned Chief Justice must be set aside; and we order judgment to be entered for the plaintiff for \$40, and full costs of suit.

The findings of the jury which Mr. Teetzel on behalf of the defendant, asked the Court to set aside, we consider fully warranted by the evidence; and the motion must be dismissed.

GALT, C. J., and ROSE, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. BUSH.

Constitutional law—Appointment of magistrates by Lieutenant-Governor of Province—Powers of Provincial Legislatures—B. N. A. Act, secs. 91, 92—48 Vic. ch. 17, (O.)

The Crown has the prerogative right to appoint justices of the peace within the Dominion of Canada and each of its Provinces, but it derogated from that right by assenting to the B. N. A. Act, which conferred upon either the Parliament of Canada or the Legislatures of the Provinces the power to pass laws providing for the appointment of justices of the peace. Such laws are in relation to the administration of justice, and upon the proper construction of secs. 91 and 92 of the B. N. A. Act are exclusively within the power of the Provincial Legislatures under sec. 92, paragraph 14. Additional weight is given to the construction placed upon these sections, by the Parliament of Canada having from time to time since the B. N. A. Act passed laws recognizing the right assumed by the Provincial Legislatures to pass such laws and the appointments made under them.

An order *nisi* to quash a conviction made by a police magistrate appointed by the Lieutenant-Governor of Ontario under 48 Vic. ch. 17, (O.), on the ground that such statute is *ultra vires*, was, therefore, discharged, with costs.

THE defendant was, on the 20th August, 1887, convicted before William Bow, police magistrate in and for the county of Dundas, for selling, between the 8th of July and the 8th of August, 1887, intoxicating liquor, contrary to the provisions of the second part of the Canada Temperance Act, 1878, and amending Acts, then in force in the united counties of Stormont, Dundas, and Glengarry, and was adjudged for his offence to pay a fine of \$50 and costs.

The conviction was removed into this Court by *certiorari*, and on November 24, 1887, A. H. Marsh obtained an order *nisi* to quash it, on the ground, among others, that the magistrate acted without jurisdiction, inasmuch as at the time of making the conviction he was not a police magistrate for the county within which the offence was alleged to have been committed, within the meaning of that term as used in the Canada Temperance Act, 1878, and amending Acts.

There was filed a copy of the commission appointing William Bow to be police magistrate in and for the

county of Dundas, without salary, which commission was under the seal of the Province of Ontario, and was issued by the Lieutenant-Governor of Ontario on the 26th of May, 1887.

December 24, 1887, and January 3, 1888, *Irving*, Q.C., and *Moss*, Q.C., for the Attorney-General of Ontario, and *Delamere*, for the Magistrate, shewed cause, and *Marsh* supported the order *nisi*.

March 9, 1888. ARMOUR, C. J.—The point taken by the order *nisi* was treated in argument as involving the power of the Legislature of the Province of Ontario to pass laws providing for the appointment of justices of the peace within the Province, and was argued with much ability and research, and as it was so treated I think we ought to determine whether, in our judgment, the Legislature of the Province has that power; and this is determinable, in my opinion, by the construction to be placed upon the British North America Act.

There is no doubt that the Crown has the prerogative right to appoint justices of the peace by commission within the Dominion and within every Province of the Dominion, which right is exerciseable by the Crown, and by the Governor-General in the name of the Crown, under express authority to him in that behalf in the letters patent constituting his office.

This prerogative right, although exerciseable at any time, has never been exercised within this Province since the passing of the British North America Act.

Notwithstanding the existence of this prerogative right, statutes have been frequently passed with the assent of the Crown in derogation of this right, and providing for the appointment otherwise of justices of the peace, as for example the Act 9 Vic. ch. 41, to provide for the appointment of magistrates for the more remote parts of this Province, which provided that it should be lawful for the Governor or Administrator of the Government for the time

being, *by and with the advice and consent of the Executive Council*, to appoint such magistrates.

Having regard to the purposes for which and the circumstances under which the British North America Act was passed, it cannot I think be doubted that the power was thereby conferred either upon the Parliament of Canada or upon the Legislatures of the Provinces to pass laws providing for the appointment of justices of the peace, and this Act, having been assented to by the Crown, was in derogation of the prerogative right of the Crown to appoint justices of the peace, although it did not deprive the Crown of that right.

If this power was so conferred by the British North America Act, it is of no consequence that Acts of the Provincial Legislatures are assented to only in the name of the Governor-General, while only Acts of the Parliament of Canada are assented to in the name of the Crown, because the Crown by assenting to the British North America Act assented to the powers thereby conferred, and to the exercise of those powers by the Parliament or Legislatures upon which they were respectively conferred.

The fact that the prerogative right to appoint justices of the peace has not been exercised in this Province since the passing of the British North America Act, tends to show that the power to pass laws providing for the appointment of justices of the peace was intended to be conferred by that Act.

Section 91 of that Act provides that it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

If the passing of laws providing for the appointment of justices of the peace is not within the classes of subjects assigned exclusively to the Legislatures of the Provinces, it is certainly within this section, for one of the first steps

in making laws for the peace, order, and good government of Canada would be the making of laws for the appointment of justices of the peace.

Section 92 of that Act, however, provides that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: 14. "The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It is under this power given to the Provincial Legislatures to make laws in relation to the administration of justice in the Province that those Legislatures have, if at all, the power to pass laws providing for the appointment of justices of the peace.

Laws providing for the appointment of justices of the peace are, it is contended, and I think rightly, laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice; and if this contention be correct, the passing of such laws is exclusively within the power of the Provincial Legislatures.

There is a considerable weight of judicial opinion in favor of this contention, and although not binding upon us, yet, in a matter of construction such as this, it ought not to be lightly dissented from.

In *Regina v. Reno*, (October 4, 1868), 4 P. R. 281, Draper, C. J., expressed his opinion in favor of this contention.

In *Regina v. Bennett*, (October 20, 1882), 1 O. R. 445, and in *Richardson v. Ransom*, (January 11, 1886), 10 O. R. 387, Cameron, J., and Wilson, C. J., respectively expressed similar opinions. See also *Regina v. Horner*, 2 Cart. 317; *Ganong v. Bayley*, 1 Pugsley & Burbidge N. B. 324; *Ex parte Williamson*, 24 S. C. N. B. 64; *Ex parte Perkins*, 24 S. C. N. B. 66; *Regina v. Coote*, L. R. 4 P. C. 599.

But whatever doubt there may have been as to the soundness of this contention must be taken to be set at rest, by the action of the Parliament of Canada, with which, if not with the Provincial Legislatures, the power to pass laws providing for the appointment of justices of the peace rests.

In *Citizens Insurance Co. v. Parsons*, 7 App. Cas. 96, 96, the judicial committee say: "The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered." See also *Wilberforce* on Statute Law, 143.

The Legislature of the Province of Ontario, in its first session after the passing of the British North America Act, assumed the right to pass laws providing for the appointment of justices of the peace, and has ever since continued to pass such laws without any disallowance thereof or any protest against or interference with such assumed right either on the part of the Dominion Government or otherwise.

In pursuance of such laws justices of the peace have from time to time since the passing thereof been appointed under the authority thereof: police and stipendiary magistrates have also been appointed from time to time in like manner and under the like authority; and the Dominion Government has never in any way or at any time interfered with any such appointments.

On the contrary, the Parliament of Canada has from time to time since the passing of the British North America Act passed laws recognizing the right so assumed and the appointments so made.

The very Act under which the conviction in question took place, the Canada Temperance Act, 1878, expressly recognizes police magistrates for counties in the Province of Ontario, functionaries for the appointment of whom

there was no authority before the passing of the British North America Act, and who owe their appointment solely to Acts of the Legislature of Ontario.

In the face of the judicial opinion to which I have referred, and in face of the action of the Parliament of Canada, and of the other circumstances to which I have adverted, I do not think that this Court can properly hold that the Legislature of this Province had not the power conferred upon it by the British North America Act to pass laws providing for the appointment of justices of the peace.

In my opinion, therefore, the order *nisi* must be discharged, with costs.

STREET, J.—The convicting magistrate was appointed to his office by the Lieutenant-Governor of Ontario, acting under the authority of an Act passed in 1885 by the Legislature of this Province, 48 Vic. ch. 17, and the sole question to be determined is whether the Legislature in passing the Act in question were acting within their powers. We have had the advantage of hearing most able and exhaustive arguments upon the important question involved, in all its bearings; but the point seems after all to come back to the construction to be placed upon a few clauses of the British North America Act, aided by the manner in which the matter has been dealt with by the Legislature of Ontario and the Parliament of the Dominion.

Under the 92nd section of the British North America Act the Legislature of each Province may exclusively make laws in relation to matters coming within certain subjects, which include (para. 14), “the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.”

Now these words, standing alone and without any interpretation or context, appear to me to be sufficient, had no other clause in the Act limited them, to confer upon the

Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the Judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters.

The words of this para. 14 of sec. 92 are, however, limited by the 96th section, which provides that the Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick; and by the 100th section, which provides that the salaries, &c., of the Judges appointed by the Governor-General, and of some others, shall be fixed and provided by the Dominion Parliament; and the words of para. 14 are further limited by the 101st section, which provides that "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada."

"The Criminal Law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters," are subjects reserved to be dealt with exclusively by the Parliament of Canada by para. 27 of sec. 91 of the British North America Act.

Everything coming within the ordinary meaning of the expression "the administration of justice," not covered by the sections which I have referred to, therefore, remains, in my opinion, to be dealt with by the Provincial Legislatures in pursuance of the powers conferred upon them by para. 14 of sec. 92, excepting only what has been subtracted from those powers by the other sections which I have quoted: this is the result at which I have arrived by comparing together the different sections of the Act with the object of finding whether any good reason exists for not giving to the words of para. 14 their ordinary meaning. It is clearly the intention of the Act that the Pro-

vincial Legislatures shall be responsible for the administration of justice within their respective Provinces, excepting in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred, by which the appointment of the Judges of certain Courts is reserved to it. The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.

An argument which was pressed against this construction was that if the appointment of all justices of the peace were left in the hands of the Provincial Legislatures, the Dominion Parliament and Government might find itself unable to enforce the laws which it passed, by reason of the administration of justice being in the hands of persons under the control of a possibly hostile Provincial authority. Such a state of things can, however, hardly have been in contemplation of the framers of the Act, and if it should come about there are other means, I think provided by the Act for overcoming any difficulty created by it, in addition, probably, to means which are not affected by the Act.

The meaning of the word "constitution" was much discussed by the counsel for the defendant, and if the Provincial Legislature had been possessed of no power excepting that connected with the "constitution, organization, and maintenance" of Provincial Courts, the meaning of these words as here used would have been extremely important; but these words do not, as I read the clause, in any way limit the scope of the general words preceding them, by which the whole matter of the administration of justice is included. The fundamental weakness of the defendant's argument appears to be his assumption that

the word "including" in this para. 14 is to be read as if it were "videlicet," or as if the words "the administration of justice" were to be treated for the purpose of this discussion as being entitled to no weight.

With regard to these words, "constitution, organization, and maintenance," the meaning of which was much discussed, it is perhaps worthy of notice that they are also used in the 101st section of the British North America Act, where authority is given to the Dominion Parliament to provide for the "constitution, maintenance, and organization," of a Court of Appeal: and that that Parliament proceeded in "the Supreme and Exchequer Courts Act" to provide and declare in what manner and by whom the Judges of the Supreme Court should be appointed.

The construction which gives to the Provincial Legislatures the power of appointing justices of the peace in the Provinces, to the exclusion of the Parliament of the Dominion, relates to the distribution of legislative powers as between the Dominion and the Province, and does not necessarily exclude any right which may exist in the Crown to make such appointments as a matter of prerogative.

The right of the Provincial Legislature to deal with such appointments has been the subject of consideration in several cases in this Province, and has been affirmed in all of them. I refer to *Regina v. Reno*, 4 P. R. 281; *Regina v. Bennett*, 1 O. R. 445; *Richardson v. Ransom*, 10 O. R. 387.

The Dominion Parliament has in numerous Acts recognized the status of police magistrates appointed by the Legislatures of the Province, notably in the very Act against which the offence in the present case was committed. An Order in Council published in the *Canada Gazette* at p. 802, for the year 1886, shews the application of certain fines received by the Dominion Government under the convictions of magistrates appointed by the Provincial authorities. In short, the Legislatures of the Provinces have from the time the British North America Act

went into force down to the present time acted on the assumption that they possessed the power in question. The Dominion Parliament has apparently acted upon the same assumption, and in every case which has come before the Courts in this Province where the point has been raised, the same opinion has been expressed. It is true, as was urged by the defendant, that there is nothing in all of this consensus of opinion which is technically binding upon us, or which operates as concluding the question. But where the construction of the Act upon which it depends is a doubtful one, as the defendant contends it to be, the manner in which it appears to have been interpreted for a long series of years by the Governments which are interested is entitled certainly to consideration.

I concur in the opinion that the order *nisi* should be discharged, with costs, such costs to be limited to the ordinary costs, and not to include the costs of the Attorney-General.

FALCONBRIDGE, J., concurred.

Order nisi discharged.

[QUEEN'S BENCH DIVISION.]

WICKENS V. McMEEKIN ET AL.

Principal and surety—Limited term of employment of principal—Subsequent extension—Construction of bond—Estoppel.

M. having been employed by the plaintiff as a sub-agent in the collection of money, &c., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M., and was conditioned that if M. should, from time to time and at all times thereafter, account and pay to the plaintiff, &c., and at all times during such period as he should act as agent, &c., pay all sums received, &c., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond, and was only till the 31st December, 1884, but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M., by subsequent arrangement, continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886.

Held, notwithstanding the want of knowledge on the part of the sureties, that the appointment recited in the bond must be taken to have referred to the appointment made before its date; and that the creditor and the principal could not, by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period did not justify the position that the sureties must have contracted with a view to a subsequent extension.

A letter was written by one of the sureties to the plaintiff on 17th December, 1886, in which he notified the plaintiff that from that date he withdrew from his suretyship.

Held, that this could not estop the surety from denying his liability; and even if it was to be read as shewing that the surety assented to the continuation of the employment of M., it was immaterial.

Kitson v. Julian, 4 E. & B. 854, and *Sanderson v. Aston*, L. R. 8 Ex. 73, followed.

THIS was an action tried at the Toronto Winter Assizes, 1888, before Street, J., who reserved his decision, and afterwards delivered the following judgment, in which the facts are stated.

Robinson, Q. C., and T. P. Galt, for the plaintiff.

Moss, Q. C., and A. D. Cameron, for the defendants.

February 27, 1888. STREET, J.—The bond sued upon recites that Richard Wickens and John R. Mitchell have appointed McMeekin to be an agent at Hamilton for the Commercial Union Assurance Company. The appoint-

ment had been made before the date of the bond, but the written evidence of it was not delivered to McMeekin until the bond had been executed and returned to the obligees. The written certificate of the appointment declares that it is to be in full force from the date at which it was given, until the 31st December, 1884, and these must be taken to have been the terms of the appointment recited in the bond. There was no evidence to shew that the duration of the appointment was communicated to the sureties at any time, either before or after the execution of the bond, and I find as a fact that they were not aware at the time they executed the bond, nor at any time afterwards, until they discovered the fact during the progress of the trial, that the appointment of McMeekin was originally for a limited time only. The condition of the bond, so far as it is material here, is, that "if McMeekin shall and do, from time to time, *and at all times hereafter*, well and truly account for and pay over to Wickens and Mitchell, or either of them, or the survivor of them, or the executors or administrators of such survivor, &c., all moneys, &c., and do and shall from time to time, and *at all times during such period as he shall act as agent for the said Commercial Union Assurance Company*, or the said Wickens and Mitchell, or any one of them, monthly, upon the fifteenth day of every month, or such other date as may from time to time be fixed for such payments, pay and satisfy unto the said Wickens and Mitchell, or either of them, or the survivor of them, all such sum or sums of money as shall or may from time to time be received for the month then last past by John McMeekin as such agent as aforesaid, or to the use and benefit of the said Commercial Union Assurance Company, or the said Wickens and Mitchell, or one or either of them, in any way whatsoever," then the obligation to be void.

The authorities clearly shew that where the appointment of the principal is for a limited time only, and the period of his appointment is either recited in the bond, or fixed

by statute, the sureties are not liable for breaches committed by the principal after the period of his original appointment has expired, and that general words such as are found in the condition here, which, literally construed, would extend the liability of the surety to the whole period of the actual employment of the principal, are to be restricted in their meaning to the shorter period mentioned in the recital, or fixed by the statute under which the engagement of the principal is made. See *Lord Arlington v. Merricke*, 2 Wms. Saund. 813 ; *Bamford v. Iles*, 3 Ex. 380 ; *Peppin v. Cooper*, 2 B. & Ald. 431 ; *Hassell v. Long*, 2 M. & S. 362 ; *Corporation of Adjala v. McElroy*, 9 O. R. 580.

The case of *Kitson v. Julian*, 4 E. & B. 854, is a strong authority in favor of the sureties here: there the sureties had entered into a bond for the faithful performance of the duties of a clerk, the fact of whose appointment, but not its duration, was recited in the condition. The sureties being sued upon the bond, pleaded that the clerk had been appointed for a year and no longer, and that the breaches occurred after the year had expired: the plaintiff replied that after the expiration of the year the clerk remained in his employment with the assent of the sureties. On demurrer to the replication, it was held that the allegation in the plea of the length of the clerk's engagement had the same effect as if it had been recited in the condition: that the plea showed a good defence, and that the replication was no answer to the plea, for it did not shew more than a fresh appointment by parol, which would not be comprehended in the condition of the bond.

The case would therefore be precisely in point here, were it not that Lord Campbell, C. J., in his judgment, says that he thinks the Court must assume that the sureties were aware of the extent of the employment of the clerk.

The absence of any allegation in the plea that the sureties were aware of this fact does not appear to have been commented upon during the argument, and upon principle it would seem that the absence of such knowledge would

not have affected the result. The liability which the sureties undertook must have been assumed to its full extent when they executed the bond, for they never entered into any new obligation.

If the creditor and the principal had confined themselves to the contract which was in existence when the bond was executed in the present case, the employment of the defendant McMeekin, and with it the liability of the other defendants, would clearly have terminated on 31st December, 1884, long before the breaches which are complained of took place, and it would be contrary to the principles which have been so long established in questions of suretyship, that the creditor and the principal should, by an arrangement made after the liability of the surety was created, be allowed to extend that liability beyond the period which originally formed its limit. The mere fact that words are found in the condition which would apply to the extended period of McMeekin's engagement, will not justify the position that the sureties must have contracted with a view to a subsequent extension.

The language of Kelly, C. B., in *Sanderson v. Aston*, L. R. 8 Ex. 73, is in point here; he says: "The authorities cited go to shew that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless those terms are made part of the surety's agreement, or unless something has been done which with reference to those terms substantially alters his position."

The letter from the defendant Bell to the plaintiff on 17th December, 1886, in which he notifies the plaintiff that from that date he withdraws from his suretyship cannot help the plaintiff. It shews that the writer was under a misapprehension of his rights, and supposed his liability still to be in existence, but it cannot operate to estop him from denying his liability, for there are no facts which would entitle the plaintiff to set it up as an estoppel; it cannot be accepted as proof that the writer had contracted with reference to an extended engagement of McMeekin,

because no such extension is shewn to have been contemplated when the contract was entered into, and if it is to be construed as shewing that Bell assented to the continuation of the employment of McMeekin, that fact is immaterial under the decision in *Kitson v. Julian*.

The only defalcations having been committed by McMeekin in November and December, 1886, long after the termination of the year for which he was originally appointed, I must hold that the defendants Bell and Kilgour are not liable to make them good, and the action as to them must be dismissed, with costs.

The words of the condition are, I think, sufficiently wide, when construed with reference to McMeekin's duties, to enable me to hold that he is liable to pay to the plaintiff any moneys collected by him on account of the Commercial Union Assurance Company, so long as he continued its agent, and so long as the plaintiff was entitled to receive such moneys. The plaintiff is, therefore, entitled to judgment referring to an officer of the Court to ascertain the amount of the defalcations, and should recover from McMeekin the amount so ascertained, with his costs of the action and reference.

[COMMON PLEAS DIVISION.]

BETTS V. SMITH ET AL.

Contract—Tender—Evidence of prior agreement—Guarantee—Reference to advertisement.

The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for \$1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B. by whom the tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender by which he was to get 75 cents a day for every three meal tickets, and the committee were to charge \$1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract.

At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection.

In an action to recover the amount of the plaintiff's loss from the defendants, *Held*, [MACMAHON, J., dissenting] that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable.

Per MACMAHON, J.—The advertisement and requirements must, under the circumstances, be incorporated into the tender and acceptance, and so form part thereof so as to render the defendants liable.

McNeely v. McWilliams, 13 A. R. 324, and *Lindley v. Lacey*, 17 C. B. N. S. 578, commented on.

THIS action was tried before Rose, J., and a jury, at Toronto, at the Fall Assizes of 1887.

The statement of claim alleged that in the month of June, 1886, the plaintiff and the defendants entered into a contract, whereby it was agreed that the plaintiff should furnish three meals on Monday, the 12th July, 1886, at the Exhibition grounds, in the city of Toronto, for from 300 to 500 persons, and should furnish three meals at the said Exhibition grounds, on each of the following days for from 1,500 to 2,000 persons, for each of which so to be furnished, the defendants agreed to procure persons to

apply to the plaintiff for the service of such meals upon them, and agreed to pay the plaintiff at the rate of 25 cents for each meal, at 75 cents for each group of three meals. It then alleged that the plaintiff incurred large expense in order to enable him to fulfil the said contract; but the defendants neglected to find and procure the said number of persons to apply for the said meals; and neglected and refused to pay the plaintiff for any of the said meals, save only those that were actually served upon persons who applied to the plaintiff for the same, which persons were much less in number than those whom the defendants had agreed, as aforesaid, to procure to apply to the plaintiff for such service; whereby the plaintiff sustained loss and damage.

The plaintiff further alleged that the defendants stated and represented to the plaintiff that there would be at least 300 persons upon the Exhibition grounds on 12th July, and that there would be at least 1,500 persons upon the said grounds on each of 13th, 14th, and 15th days, who would respectively require upon each of the said days three meals each from the person who would enter into contract with the defendants, which is set forth, and the representation was so made to the plaintiff for the purpose of inducing him to enter into the said contract; and the plaintiff relied upon the said representation, and was thereby induced to enter into a contract with the defendants, whereby it was agreed that the plaintiff should furnish meals upon the said Exhibition grounds, consisting of breakfast, dinner and supper for the defendants upon each of the said days, at the rate of 75 cents for every group of three meals; and the plaintiff, relying upon the said representations, did enter into great expense, &c., as before stated.

The defendants denied the allegations contained in the statement of claim; claimed the protection of the Statute of Frauds; alleged that the credit was not given to them personally; and averred payment.

The only witness examined was the plaintiff. He stated

that he tendered for the demonstration to the executive committee of the Knights of Pythias; and the following is a copy of his tender.

28th June,

MR. J. RATTRAY, Sy.,—

I will furnish meals (Breakfast, Dinner, and Supper,) for the Uniformed Knights of Pythias on the following terms, and give a guarantee of the same: I will give 25 cents per head per day; that is to say, the committee to pay me 75 cents for every three meal tickets. Meals served at any time daily the committee may decide on.

EDWARD BETTS.

P. S. I will furnish hot or cold supper, which ever might be decided by the committee. E. B."

He then stated he received the following note from Mr. Rattray:

K. P. Committee,
Toronto, June 29th, 1886.

DEAR SIR,—I am instructed to inform you that your tender for meals has been accepted.

A. J. RATTRAY, Secy. Exe. Com.

This was the whole evidence of the contract.

The plaintiff then proved he had sustained very serious loss in consequence of the non-attendance of persons to partake of the meals provided by him; but it is unnecessary to refer to this branch of the case.

The plaintiff put in evidence an advertisement in the *Globe* newspaper, the evidence given in respect of which was as follows: Mr. Lount—"I put in what has been put in as evidence in the examination of Mr. Rattray. 'You say you advertised for tenders for expected guests? Have you a copy of the advertisement inserted in the paper? Yes.'"

The advertisement was as follows:

KNIGHTS OF PYTHIAS.

Tenders for Dining Hall and Refreshments at the Exhibition Grounds. Tenders for the above will be received up to 12 o'clock on Monday, 28th inst. Instructions and requirements may be had on application to Mr. S. Bronsden of 2 King St. east.

The reception of this was objected to by Mr. Bigelow, on the ground that Mr. Betts was not aware of this at the time of his tender.

Mr. Lount then put in, subject to Mr. Bigelow's objection, a statement as follows:

Requirements of Tender
for
Furnishing Meals and Refreshments.

Meals—There will be from 1,500 to 2,000 uniformed Knights, including some ladies and friends, for which meals will be required. Tenderers will submit a bill of fare that they will guarantee to furnish for \$1 per day. The accepted tenderer will also require to furnish three meals on Monday, July 12th, for from 300 to 500, who will arrive on Sunday evening. Tenders to state what amount will be paid for the privilege of the above, and the amount will be required to be paid to the committee before the agreement is ratified. Meals to be supplied to ticket holders only, and the committee will receive all moneys from the Division, and pay the contractor according to the tickets held by him.

The learned Judge directed judgment to be entered in favour of the defendants.

In Michaelmas sittings, *Lount*, Q.C., moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff, on the grounds, that the judgment is contrary to law, and evidence, in this that the learned Judge was in error in holding that the contract between the plaintiff and defendants was confined to the letter from the plaintiff to the defendants, dated the 28th day of June, 1886, and the reply thereto from the defendants to the plaintiff, dated the 29th June, 1886, and that by such letter no cause of action was made out against the defendants. The learned Judge should have held that the invitation for tenders for the furnishing of the meals published in the *Globe* newspaper, and the requirements of tender for the said meals, and the correspondence between the plaintiff and defendants filed on the trial of the action, and the evidence

given at the said trial, formed part of the contract, and the plaintiff was entitled to succeed thereon.

During the same sittings, *Lount*, Q.C., supported the motion, and referred to *Taylor* on Evidence, 8th ed., pp. 876-8, secs. 1026-7; *Corporation of York v. Gravel Roads Co.*, 11 A. R. 765; *McNeely v. McWilliams*, 9 O. R. 728, 730, 742-3; 13 A. R. 324; *Ellis v. Abell*, 10 A. R. 226, 242-3; *Kerr* on Frauds, 2nd ed., 401; *Polhill v. Walter*, 3 B. & Ad. 114; *Petrie v. Guelph Lumber Co.*, 11 A. R. 336; *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, 610; *Lindley v. Lacey*, 17 C. B. N. S. 578.

Bigelow, contra, referred to *McNeely v. McWilliams*, 13 A. R. 324; *Wylson v. Dunn*, 34 Ch. D. 569, 573-4; *Hornor v. Groves*, 15 C. B. 667, 669.

February 11, 1888. GALT. C. J.—It is manifest that the intention and expectation of the committee was, that they would receive a premium for the right to furnish the meals. It was proved that the plaintiff had not seen the advertisement and requirements when he was requested to send in a tender. What led to this tender was as follows: He said one of the defendants, Mr. Mitchell, called on him on the evening of the 28th June, and asked him if he was going to put in a tender. The plaintiff replied that he knew nothing about it. He was then asked if he had seen the advertisement. He said, no. He went on to say that there would be from 1,500 to 2,000 uniformed Knights who would require meals at the Exhibition grounds on the 13th, 14th, and 15th September. After some further conversation Mitchell said he would go and send Mr. Bronsden to see him.

I gather from the evidence that Mr. Bronsden was the person by whom such tenders should be received, as he was the person referred to in the advertisement. Bronsden came. The plaintiff then proceeds: "I asked him to tell me all about it. He told me there would be from 1,500 to 2,000 meals required three times a day for those days. I asked him if he would guarantee, or if the committee

would guarantee, that much. Yes, he said, we will guarantee 1,500 ; and, on the other hand, we shall require you to provide for 2,000 a day, if you can do it. I said, yes, I could do it. I asked him what kind of a meal he thought would suit them, and he told me. Then I asked him what price they would expect to pay a day for it, and he told me there would be a dollar a day charged for three tickets. Then I went and wrote my tender that I was to get 75 cents a day, and they were to charge a dollar. I wrote my tender out and enclosed a dinner bill of fare, and a breakfast bill of fare."

The plaintiff then states ; " On the 29th," that was the next evening, " Dr. Smith, Mr. Mitchell, and Mr. Rattray, came in and said that my tender was accepted, and that they would send me a letter to-morrow to that effect, when some one suggested, I do not know which one it was, that a letter might be written there and then, which Mr. Rattray did, and handed it to me."

It appears from the evidence, that very few Knights took their meals from the plaintiff. The majority of them got their meals at another place where the charge was 25 cents a meal in place of \$1 for three meals.

Mr. Lount's contention at the trial and on the argument before us was, that the statements made to the plaintiff by Mitchell and Bronsden before the tender was made, were a warranty ; and therefore the plaintiff was entitled to recover, as there was no doubt the attendance had been very much smaller than was stated.

The learned Judge was of opinion that the tender and acceptance constituted the contract ; and as there was nothing in them referring to the number of tickets, the plaintiff could not recover.

I concur in this opinion. The defendants, acting as a committee to superintend the reception of a large number of visitors, and being desirous not only of providing accommodation for them, but also to secure a profit to themselves advertised for tenders. The tenders were *not* for services to be rendered by the tenderers, and to be paid for to them,

but for services which they would be willing to pay for the privilege of rendering. The plaintiff was applied to personally by one of the committee to know whether he would tender. It was represented to him there would be a large attendance, and there is no reason to doubt the good faith of Mitchell when he first spoke to the plaintiff and suggested to him that he should see Bronsden. It does not appear what position Bronsden filled; he is not one of the defendants. Bronsden came and made certain statements as to the number of visitors who were expected to be present. He then received from the plaintiff the tender referred to. The following evening, "Dr. Smith, Mr. Mitchell and Mr. Rattray came in and said my tender was accepted, and they would send me a letter to-morrow to that effect, when one suggested, I do not know which one it was, that a letter might be written there and then, which Mr. Rattray did, and handed to me."

It appears to me this constituted the contract, and to introduce what is now contended for, no doubt would be to add a liability that never entered into the minds of the defendants when they accepted the tender of the plaintiff. It was not shewn that, with the exception of the defendant Mitchell, any representation was made by any of the defendants to the plaintiff; and there is nothing to show that there was any false representation made to induce the plaintiff to make his tender. The committee expected to derive a profit from the sale of tickets, and they were disappointed. There is no doubt but that both Mitchell and Bronsden expected there would be a numerous attendance of persons on the Exhibition Grounds, and that those persons would require meals; and the disappointment that has occurred has arisen from the circumstance that the persons who did attend purchased their meals from another person than the plaintiff.

The motion must be dismissed, with costs.

MACMAHON, J.—I have the misfortune to differ from the rest of the Court in this matter. I do not think this case

is governed by *McNeely v. McWilliams*, 13 A. R. 324, as has been assumed.

The advertisement calling for tenders, and referred to in the judgment of his Lordship the Chief Justice, appeared in the *Globe* newspaper in this city, and the plaintiff's attention was called to the fact of the advertisement having been published by one of the defendants, Mr. Mitchell, who told him the substance of the advertisement, and where he could ascertain the requirements of the tender, promising to send Mr. Bronsden who had the requirements in his possession, which he did.

What took place at the interview between the plaintiff and Mitchell, and also at the former's interview with Bronsden, is as follows :

Mr. Lount.—Were you spoken to by any person with regard to this furnishing of board? Yes, Mr. Mitchell called on me first. Is that one of the defendants in this suit? Yes. He called on you when? On the evening of the 28th June. Where were you at the time? In the restaurant. Anybody with him? No, I think I was sitting there all alone; it was after I had closed up for the night, that he called. Just state what took place. When he first called in he asked if I was going to tender to supply the Knights with meals at the Exhibition grounds. I told him I had heard nothing about it. He asked if I had not seen the advertisement in the papers? I told him no, I had not noticed it, and asked him to give me the substance of the advertisement. He went on to say that there would be from 1,500 to 2,000 uniformed Knights who would require to take meals at the Exhibition grounds for the 13th, 14th, and 15th July, and that also the accepted caterer would have the exclusive use of the ground for those three days. After talking some time I asked the question, and I was distinctly told that whoever was accepted would have the exclusive right. I asked him if he was sure of the number being there, and he said "Yes, positive, and more than the number." I asked him if he would guarantee that number; and he said, "I will guarantee 1,500, but we shall require you to provide for 2,000." He said he would go and send Mr. Bronsden to see me. He went, and, when Mr. Bronsden came, he told me something about the same.

The Court—Who is Mr. Bronsden ?

Mr. Lount—He is the person mentioned as having the requirements.

The Court—You have not proved that yet. (To witness.) What did he say he sent Mr. Bronsden for ? He sent him to settle the thing with me, as he had not time, and that was the night of their receiving tenders ; they wanted to close them, and if I would tender he would take it along with him and put it before the committee.

Mr. Lount—Then Mr. Bronsden came ? Yes. What did he say ? (Objected to.)

The Court—I shall receive it now. Mr. Bronsden continued the interview.

Mr. Bigelow—It has not been shewn that Mr. Bronsden was a member of the committee. It is not shown that Mr. Rattray had any authority except by resolution of the committee.

The Court—At present I will receive the evidence as being of the same importance as that with regard to Mr. Mitchell.

Mr. Lount—(To witness.) What did Mr. Bronsden say ? I asked him to tell me all about it. He told me there would be from 1,500 to 2,000 meals required three times a day for those three days. I asked him if he would give me a guarantee, or if the committee would guarantee that number. "Yes," he said, "we will guarantee 1,500, and on the other hand we shall require you to provide for 2,000 a day if you can do it." I said yes, I could do it. I asked him what kind of a meal he thought would suit them, and he told me. Then I asked him about what price they would expect to pay a day for it, and he told me there would be a dollar a day charged for three tickets. Then I went and wrote out my tender, that I was to get 75 cents a day and they were to charge a dollar. I wrote my tender out, and enclosed a dinner bill of fare and a breakfast bill of fare.

The plaintiff's evidence is uncontradicted ; and, if so, he was tendering on the strength of the advertisement and the "requirements for furnishing meals" in Bronsden's custody ; and it should be considered as being incorporated in the tender and form part of it, otherwise a gross fraud would be perpetrated on the plaintiff.

The fact of the plaintiff not having seen the newspapers calling for tenders, or the "requirements," can

make no difference. Had Bronsden gone to the plaintiff and said, "I have lent the paper containing the *requirements*, to a person who proposes tendering, but I can tell you what it contains," it cannot be pretended that, not having seen the document, can make any difference.

If the defendants were asking for tenders in conformity with the "requirements," and the plaintiff tendered in view of what the requirements called for, then I think the bargain was concluded in reference to what was contained therein, and could not be excluded as evidence for the plaintiff.

This case, I conceive, comes within the principle of *Lindley v. Lacey*, 17 C. B. N. S. 578, cited by Mr. Lount at the trial.

In my opinion the nonsuit entered by the learned Judge at the trial should be set aside, and a new trial had between the parties.

ROSE, J., concurred with GALT, C. J.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

IN RE ROBERTSON ET AL. AND THE CORPORATION OF THE
TOWNSHIP OF NORTH EASTHOPE.

Municipal corporation—Drainage by-law—Municipal Act, 1883, sec. 570 et seq.—Majority of land-owners—"Mechanical operations"—Notice—Allowance of lump sum for roads—Duties of engineer.

Upon a motion to quash a by-law providing for the assessment of certain owners of land for the cost of drainage work for the benefit of their land, under sec. 570 *et seq.* of the Municipal Act, 1883 :

Held, 1. That the petition of land-owners for such by-law should include a majority of all the persons whom the engineer finds to be benefited by the proposed work.

Re Romney and Mersea, 11 A. R. 712, and *Re Dover and Chatham*, 12 S. C. R. 321, followed.

2. That the engineer is at liberty to leave out of his scheme portions of the land mentioned in the petition, and the calculation as to the necessary majority should be made without considering the owners of such land.

3. That a petitioning land-owner has the right to withdraw his lands from the scheme before action has been taken under the engineer's report, and that if he does so he should not be reckoned as a petitioner in making the calculation.

Re Misener and Wainfleet, 46 U. C. R. 457, followed.

4. But even where, applying these principles, it is determined that the proper proportion of persons interested have not petitioned, a by-law valid on its face, passed by the council without objection, and under a *bona fide* belief, concurred in at the time by all parties concerned, that they had been properly set in motion, should not be quashed.

5. The words "mechanical operations" in sub-sec. 8 of sec. 570 of the Municipal Act must not be read in their widest sense ; the provisions of the sub-section requiring a two-thirds majority are not intended to apply to every case in which it may become necessary to build or heighten a bank at the side of a drain, or to strengthen it in places by the addition of timber or logs.

6. The applicants to quash the by-law, having followed in their application the notice given by the council under sec. 572 to intending applicants, should not be prejudiced because that notice was incorrect ; the council must be held to their own notice.

7. The allowance in the engineer's report of a lump sum as "chargeable to municipality for roads" was sufficiently definite, there being only one municipality concerned.

Re Essex and Rochester, 42 U. C. R. 523, distinguished.

8. The engineer, having himself made an inspection of each lot and estimated how much each would be benefited by the drain, might properly delegate to an assistant the duty of making a calculation upon the basis established by him.

Motion by *Lash*, Q. C., and *J. E. Harding*, on behalf of four property owners, assessed for part of the cost of drainage works, to quash the by-law No. 220 of the township of

North Easthope, in the county of Perth, under which they were assessed.

Idington, Q. C., contra.

The by-law in question was passed on 11th July, 1887, and recited that a majority of the owners, as shewn by the last revised assessment roll, of the property thereafter set forth, to be benefited by the deepening and straightening of a creek contiguous to the said lands, had petitioned the council to have the proposed work done in accordance with the provisions of section 570 and the following sections of the Municipal Act, 1883 (O.) It further recited the appointment of an engineer, his examination of the property, and his report, and it concluded with a schedule of the lands to be benefited, and the amount of the benefit to each parcel.

The petition was recited at length in the by-law, and a comparison between the lands mentioned in it and those in the schedule to the by-law, as finally passed, shewed that two of the parcels mentioned in the petition were not included in the engineer's report or in the schedule to the by-law, and that three or four of the parcels in the schedule were not included in the petition.

The grounds urged upon the argument were that the majority required by the first paragraph of sec. 570 had not been obtained to the petition, and that the council never had jurisdiction to initiate the proceedings or pass the by-laws, and other grounds of objection, which with the facts are set out in the judgment.

February 27, 1888. STREET, J.—It seems to be a matter of doubt as to whether the petition must be signed by the majority of the owners of the lands mentioned in the petition only, or whether, when other lands are added by the engineer's report, as being benefited, the names of a majority of the whole of the owners of all the lands included in his report must be found attached to the petition.

The authority of the cases of *Re Montgomery and Raleigh*, 21 C. P. 381, and *Re White and Sandwich*, 1 O. R. 530, in which the former view was taken, if not actually overruled by the later cases of *Re Romney and Mersea*, 11 A. R. 712, and *Re Dover and Chatham*, 12 S. C. R. 321, must be taken to be very much shaken, and I think the meaning of this section 570 may, since the later cases, be taken to be at all events open to that which seems to me to be its proper construction, viz., that the petition should include a majority of all the persons whom the engineer finds to be benefited by the proposed work, and therefore that if the lands benefited extend so far beyond those mentioned in the petition as to reduce the majority to a minority, the council should not proceed with the matter without obtaining the consent of a majority of the whole.

In this view of the matter the owners of the lands to be benefited could not from any point of view exceed sixty-one in number. The applicants contended for a list containing that number of owners, which includes the names of Adam Thomson, Henry Stein, and Frederick Ellmans. These were persons who did not petition, and were not the owners of land mentioned in the petition, but were the owners of land added by the engineer as being benefited, and I think they were properly included in the number of owners for the purpose of ascertaining whether the petition had been signed by the proper proportion.

The applicants say that A. M. Fisher, John Becker, Wm. Rotharmel, and Alex. Crerar should be counted, because they are assessed as owning land which the petition states will be benefited. The respondents say that they should not be counted, because the engineer has not included their lands in those to be benefited.

I think the engineer's decision concludes the question, and that he was at liberty to leave out of his scheme portions of the lands mentioned in the petition.

The lands of Jos. Whiteman, Elijah McIntosh, and Catharine McIntosh form part of the south half of lot 20, 7th concession. The engineer's report and the by-law com-

plained of cover the whole of this south half, and it is all liable to assessment. The engineer, however, on his plan has marked off a small portion of the lot as not intended to be included in the lands to be benefited, and it appears that this is the portion owned by these three persons. Under these circumstances, I think the report and by-law must be looked to, and not the plan upon which they are founded; the objection not having been taken before the Court of Revision, the whole of the south half of lot 20 is clearly liable to assessment, and all the owners of it must be counted.

Valentine Knechtel was not on the assessment roll as owner of any land, but only as a land-owner's son, and should not be counted.

Aaron R. Good is assessed upon the assessment roll for $8\frac{1}{2}$ acres of lot 18, in the 7th concession, and signed the petition.

G. Wettlaufer is not upon the roll for any part of lot 18.

The engineer has included in the parts of that lot which are benefited, "G. Wettlaufer's parcel, $8\frac{1}{2}$ acres." The identity of this parcel with that of Good is proved by Mr. Fisher, and Good should therefore be counted both as one of the persons whose lands are benefited and as one of the petitioners.

From the original number of owners contended for by the applicants, I therefore strike off the names of Fisher, Becker, Rotharmel, Crerar, and Valentine Knechtel, leaving the total number of persons to be benefited under the by-law fifty-six.

Of these fifty-six owners the names of twenty-eight are attached to the petition, not including William Dotzer, Levi Cook, and J. B. Schmidt, who admittedly were not qualified petitioners. I think that the name of G. G. Oliver should also be struck off. He applied to the council by petition, before any action had been taken by them under the engineer's report, to withdraw his lands from the scheme; and upon the authority of *Re Misener and Wainfleet*, 46 U. C. R. 457, he had the right to do so, even

though the result should be to defeat the whole object of the petition. I do not think, however, that the mere fact of my having come to the conclusion that the proper proportion of persons interested have not petitioned for the passing of the by-law imposes upon me the duty of quashing it. This objection might have been urged at a much earlier period under sec. 292 of the Municipal Act, which expressly provides a means of urging such and similar objections before the council itself before the passing of the by-law, and its submission might probably have been restrained by injunction upon the same grounds; but the applicants, after the engineer's report had been received, and before it had been acted upon, petitioned the council to have their lands withdrawn from the operation of the scheme, not upon the ground that a proper proportion of persons interested had not signed the petition, but upon the merits of the scheme itself. They were heard by the council and an adjournment was made for several days for the purpose of enabling them to shew that a majority of the persons interested were opposed to the scheme, but no objection seems ever to have been taken by them to the insufficiency of the petition in this respect. The council having apparently acted in the matter without objection, and under a *bonâ fide* belief, concurred in at the time by the applicants, and by all parties concerned, that they had been properly set in motion in the matter, and having duly passed a by-law reciting this fact, and valid in other respects upon its face, I do not feel bound to interfere, upon the sole ground that they have made what I think is an error in the way in which they have arrived at this conclusion.

The next objection is, that it appears from the specifications that this is a case coming within sub-sec. 8 of sec. 570 of the Municipal Act, which provides that, "the provisions of this section shall apply in cases where the work can be effectually accomplished only by embanking, pumping, or other mechanical operations, but in such cases the council shall not proceed except upon the peti-

tion of two-thirds of the owners above mentioned in this section."

The 10th clause of the specifications prepared by the engineer, provides that when the drain crosses low ground its sides are to be solidly banked up to the general level of the ground: the engineer, in his examination, explains this as meaning that, "when the ditch or drain crosses the creek it will require to be built up."

The 11th clause of the specifications provides that in case quicksand is met with, its effects shall be provided against by the building of protections of timber against it, and it appears from the evidence that in some places it will in fact be necessary to provide these appliances in order to prevent the quicksand from encumbering or filling up the drain. But I do not understand this sub-sec. (8) as being intended to apply to every case in which it may become necessary to build or heighten a bank on one or both sides of a drain, or to strengthen it in places by the addition of timbers or logs. If it were, then few drains could be proceeded with until a two-thirds majority had been obtained, for few can be properly constructed without the use of timber or logs in places, and without the occasional heightening of a bank. The words "mechanical operations" in the clause must not be read in their widest sense, or every ditch would be within it: they must refer to operations similar to pumping, for the clearing away of water from a low level where embanking is a part of the scheme, and where the operations for keeping the land clear of water are continuous, and extend over future years. These operations are frequently undertaken, and that they are the ones intended by the 8th sub-sec. is, I think, shewn by the provisions of the 9th sub-sec., which enable the council to pass by-laws for assessing and defraying the *annual cost* of maintaining the works.

The next objection is that the engineer has reported that only 933 acres are benefited, while nearly 2,000 acres are assessed for the cost of the drain by the by-law. This objection is met by the 6th sub-section, which enables the

engineer to extend his assessment beyond the actual piece of land benefited to the half or whole lot to which it belongs, where the person owning the piece benefited also owns the remainder of the half or whole lot assessed; and the engineer explains in his evidence that this is what he has done: the exact form of language in which he has done what the Act specially authorizes him to do is not material.

The next objection is that some of the lands included in the petition have been omitted from the engineer's report, and that lands which were not included in the petition have been included in the report. This objection, if it be one, might have been urged before the council, but was not, and I think it is too late to urge it now; but I think it is untenable, and that the engineer is not confined to the lands mentioned in the petition, nor is he obliged to include them all in his assessment, but he may amend the description in the petition of lands to be benefited, provided the general scheme remains in substance the same.

The next objection is that the notice to persons intending to apply to quash the by-law required by sec. 572 was not properly given, and that the whole publication of the by-law must be held to be invalid and of no effect at all as a compliance with the statute. In *Re Ferguson and Howick*, 44 U. C. R. 41, the omission of this notice altogether was held not a fatal objection to the by-law, but only to give to persons applying to quash it the same time that is allowed in ordinary cases, and not to confine them to the restricted period allowed by sections 572 and 573.

By sec. 572, as originally passed, notice of an intention to quash is required to be given within ten days after the final passing of the by-law, to the reeve and clerk of the municipality; and the application must be made "to the High Court of Justice, at Toronto, during the sittings next ensuing the final passage of the by-law."

This, as amended by secs. 24 and 25 of 49 Vic. ch. 37, is now to be read as requiring the application to the Court to be made within six weeks after the passing of the by-law.

The council properly advertised this by-law, so far as the by-law itself is concerned, but the notice required by the 572nd section was framed under the original Act, and not under the section as amended. The applicants gave notice to the reeve and clerk within ten days after the passing of the by-law, and applied to the Court at its next sittings as a Divisional Court, thus complying with the notice as published; but as these sittings were not held until after the expiration of six weeks from the passing of the by-law, the application was not made within the time required by the amended section, which the published notice should have followed. I think that the applicants, having followed the notice given by the council, should not be prejudiced in their rights because that notice was incorrect, and that the council must in fact be held to the notice which they themselves have given: see *Re Ferguson and Howick*, 44 U. C. R. 41. I think, therefore, I am bound to treat the application as being made in time.

The applicants further object that the report and by-law do not define what lots and roads are benefited, nor the portions benefited. So far as the lots and portions of lots are concerned, I think the report and by-law do on the whole sufficiently define them. It is true that in one or two instances the descriptions are not as full as they should be, thus: "north-half 21, 6th concession, less two parcels in north east quarter," is certainly not a definite description, on its face, of the portion assessed; but the property intended is shewn upon the engineer's report, and I have never yet seen any assessment roll in which numerous cases of the same nature do not exist, and little, if any, practical inconvenience is found to result. If the present assessment were indefinite in this way as to a large proportion of the lands affected, that might certainly be a ground for inducing the Court to interfere, but it is here indefinite in a very small number of cases, and the great balance of convenience appears to be in favor of allowing it to stand.

The objection to the lump sum of \$120 allowed by the engineer as "chargeable to municipality for roads," is

based upon the authority of *Re Essex and Rochester*, 42 U. C. R. 523, where the same form of words was used ; but in that case there being more than one municipality concerned, it was necessary, in order that each municipality might be charged with its proper proportion of the cost of the work, that the proportion chargeable to the roads in each municipality should be ascertained separately ; but here that necessity does not exist, and the report is in this respect sufficiently definite.

The final objection is, that the engineer appointed by the council did not himself do the work, but delegated to his son the duty of inspecting the properties affected and of assessing amongst them the cost of the drain. If this were made out, it would probably be a fatal objection to the validity of the by-law, and one to which effect should be given. The duties imposed upon the engineer are, to a certain extent, judicial in their character, and are such as he alone should perform. He is not, it is true, required to do with his own hand all the work from its inception to its completion, and he is at liberty, if he deem proper, to employ assistants ; but the work of examining and assessing the several parcels of land affected, for their due proportion of the cost of the drain, should be done by himself or under his immediate direction. The engineer here employed his son to assist him but he swears that he himself made an inspection of each lot, and estimated how much each would be benefited by the ditch. He seems to have divided its length into sections, and to have charged the land in each section at a fixed sum per acre, as representing the amount of benefit it would derive from the work.

This part of the work seems to have been done by himself, though the actual calculation upon the basis thus established seems to have been made by the son. But that was a mere matter of calculation involving nothing beyond a knowledge of the multiplication table, and was a part of the work which might properly be delegated to an assistant by the engineer employed. It is suggested, but not proved,

that alterations were made by the council in the engineer's report, which were not approved by him. The nature and extent of these alterations, if any, are not shewn, and the engineer signed with his own hand the report in its present shape, and must be taken to have adopted it as his own with everything contained in it. If the alterations were merely corrections of calculation or of clerical errors, as may well have been the case, they were properly pointed out to him. I do not think that upon an application of this nature I should presume that anything has been improperly or illegally done by the council in the absence of satisfactory evidence of the improper or illegal acts complained of, the onus being clearly upon the applicants.

The by-law here is valid upon its face, and no extraneous circumstances have been shewn sufficient to render it necessary that it should be quashed. The principles upon which the Courts act in applications of this nature are laid down by the late Mr. Justice Burns in *Grierson v. Ontario*, 9 U. C. R. at p. 632, in language which has been repeatedly quoted with approval: "Unless the by-law be illegal on the face of it, it rests discretionary with the Court, upon extraneous matters, to say whether there is such a manifest illegality that it would be unjust that the by-law should stand, or that it has been fraudulently or improperly obtained." With the exception of the first, all the objections taken here which are supported by proof are of a technical nature, and do not shew any hardship or injustice as likely to result from the matters objected to.

For the reasons above stated, I do not think effect should be given to any of them, and the motion should therefore be dismissed, with costs.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

KENNEDY V. OLDHAM.

Specific performance—Contract for sale of land—Statute of Frauds—Written offer by purchaser not addressed to vendor—Contract completed by correspondence and initials on offer book.

An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents.

The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents.

Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant.

THIS was an action by the vendor claiming against the purchaser specific performance of an agreement for the sale of two frame cottages on the west side of St. Andrew's Market Square, in the city of Toronto, and asking to have it declared that the purchaser had accepted the title. The defendant denied that any contract was entered into within the Statute of Frauds, and denied that he had accepted the title.

Prior to the 22nd January, 1887, the defendant had some correspondence with Messrs. H. L. Hime & Co., real estate agents, authorized by the plaintiff to sell the property in question, with reference to it.

On the 3rd January, 1887, the defendant wrote to a member of the firm of Hime & Co. asking particulars of frontage, depth, price, &c., of the property in question, saying that he had seen "one of your signs" on the property.

On the 4th January Hime & Co. wrote to the defendant giving the particulars asked for, and stating the price to be \$3,000.

On the 9th January the defendant wrote to Hime & Co. offering \$2,500 for the property.

On the 15th January Hime & Co. wrote to their principal, the plaintiff, saying they had an offer of \$2,500 for the property.

On the 19th January Hime & Co. wrote to the defendant in answer to his letter of the 9th January, saying: "We cannot accept your offer of \$2,500."

On the 22nd January the defendant called at the office of Hime & Co. and made them an offer of \$3,000 cash for the property and at their request and in their office he signed the following writing: "Toronto, 22nd January, 1887. I hereby offer for the frame cottages, Nos. 18 and 20 Maud street, Toronto, being west side of St. Andrew's Market Square, and being on a lot about 50 feet front by about 100 feet deep to a lane, the sum of \$3,000, cash. (Signed) Wm. Oldham, 50 Brant street."

This was written in a book in which were contained a great number of similar offers, and which was shewn to be the book kept by Messrs. H. L. Hime & Co. for the purpose of receiving offers for the purchase of property in their hands for sale. None of these offers were addressed to any person, but upon the back of the book were printed in gold letters the initials of the firm—"H. L. H. & Co." Messrs. Hime & Co. verbally accepted this offer immediately, and on the same day wrote to the plaintiff informing him that they had sold the property for \$3,000 cash.

The defendant employed Messrs. McMurrich & Urquhart as his solicitors to investigate the title, and on the 27th January, 1887, with his authority they wrote the following letter:

"TORONTO, January 27th, 1887.

"H. L. HIME & Co., King Street East.

"Dear Sirs,—Mr. William Oldham has instructed us to search the title of some property on St. Andrew's Market Square, which he has purchased from you. Kindly let us have a description of the property and also a draft deed so that we may be able to proceed with searching the title.

"Yours truly,

(Signed) "McMURRICH & URQUHART."

The draft conveyance from the plaintiff to the defendant containing a description of the property and stating a consideration of \$3,000, was handed to the defendant's solicitors, who on the 31st January, 1887, wrote as follows:

“TORONTO, 31st January, 1887.

“H. L. HIME & Co.,

“Real Estate Agents, City.

“RE OLDHAM PURCHASE.

“Dear Sirs,—We return herewith draft deed approved (then follow a number of requisitions connected with the title to the property).

“Yours truly,

“McMURRICH & URQUHART.”

Then followed a letter from Hime & Co. to McMurrich & Urquhart of 3rd February, 1887, in which they said: “We enclose declaration that Alexander Leith was an unmarried man at the date you mention; also all the papers we have belonging to the property. We have written to Mr. Kennedy for a discharge of the Vansittart mortgage.”

Then followed a letter from McMurrich & Urquhart acknowledging receipt of the papers and accepting the title with one or two exceptions.

On the 15th February, 1887, they wrote again to Messrs. Hime & Co. saying their client was all ready to close the matter up, and desiring to know when Hime & Co. would be in a position to close it.

On 16th February Hime & Co. answered, saying: “We are now ready to close * * if you are willing to accept Mr. Henry O'Brien's undertaking to procure a discharge of the Vansittart mortgage, which has been paid off.”

To this McMurrich & Urquhart replied on the same day, saying: “Our client * * says that he would rather wait until you get the discharge from the old country before closing this matter up.”

After some further correspondence the defendant refused to complete the purchase, and this action was brought.

The trial took place before Galt, C. J., at the Toronto

Autumn Assizes, 1887, without a jury, and the action was dismissed without costs, on the ground that no contract was shewn which satisfied the requirements of the Statute of Frauds.

During Hilary Sittings, 1888, the plaintiff moved to reverse this judgment, and the motion was argued on the 17th February.

Lefroy, for the motion.

J. MacLennan, Q.C., and *D. Urquhart*, contra.

March 9, 1888. STREET, J.—The facts appear to be undisputed and the question is one entirely of law. [The learned Judge then set out the facts, and continued]. The sole ground relied upon by the defendant's counsel at the argument was that the vendor's name was not mentioned in the offer of the 22nd January, 1887, and that the subsequent correspondence could not properly be taken as supplying it, under the authorities.

When the defendant signed the offer in the book kept by Messrs. Hime & Co. he clearly intended to make an offer to some person for the property, and the initials "H. L. H. & Co." would have been sufficient if printed at the top of the page of the book to shew to whom the offer was addressed; the fact that they are on the back of the book, coupled with the evidence shewing the purpose for which the book was kept, the persons to whom it belonged, and the place in which the offer was written and signed by the defendant, render it easy for us to incorporate the initials endorsed upon the book into the offer, so as to complete the formal proof necessary to satisfy the Statute of Frauds: *Champion v. Plummer*, 1 N. R. 252; *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Newell v. Radford*, L. R. 3 C. P. 52. There was no direct evidence, it is true, that the defendant knew of the existence of these initials when he signed the offer, but there is ample evidence that he knew to whom he was making the offer; it is evident from the letter of the 27th January, 1887, which his

solicitors wrote to Messrs. Hime & Co., by his direction, that he had purchased some property on St. Andrew's Market from them, and this property is identified by the draft deed enclosed in the letter of 31st January, 1887, from his solicitors to them, as the property mentioned in the written offer of 22nd January, 1887. The letter of 27th January, 1887, coupled with the letter of 31st January, 1887, is therefore a statement that he had purchased from Messrs. Hime & Co. the property described in the written offer, and satisfies any doubt, if there could be any, as to whether the offer was intended to be addressed to the persons whose initials are printed upon the book in which the offer was written. I think, however, that the plaintiff's case can be sustained upon the further ground that the letter from the defendant's solicitors to Messrs. Hime & Co. of 27th January, 1887, may be read as containing a sufficient reference to the offer of 22nd January, 1887, to justify their being read together. The principle upon which parol evidence is admitted to connect writings seems to be that upon which it is admitted to explain a latent ambiguity in other cases; it is not permitted in the absence of a reference to an agreement in the subsequent letter to shew first that an agreement existed, and second what the agreement was; but where the letter contains a reference to an agreement as existing, parol evidence is admissible to identify the agreement referred to and to shew that it was in writing.

In *Ridgway v. Wharton*, 6 H. L. 238, "instructions" were referred to in a letter, and it was held that parol evidence might be given to shew that instructions had been given in writing and that there were no other instructions than the document produced.

In *Baumann v. James*, L. R. 3 Ch. 508, a letter referred to "the rent and terms agreed upon," and it was held that this entitled the plaintiff to give parol evidence to shew that the rent and terms mentioned in a report and letter, not otherwise connected with the later letter were those intended.

In *Long v. Millar*, 4 C. P. D. 450, the word "purchase" in a receipt was held to mean "agreement to purchase," and to let in parol evidence of a previous agreement which was incomplete under the Statute of Frauds unless treated as incorporated with the receipt.

In *Cave v. Hastings*, 7 Q. B. D. 125, the defendant in a letter to the plaintiff referred to "our arrangement for the hire of your carriage," and this was held to entitle the plaintiff to shew by parol that the only arrangement for the hire of his carriage was a memorandum which the plaintiff had signed agreeing to let his carriage to the defendant for a year, and thus to complete the evidence of a contract in writing signed by the defendant.

In the present case the defendant's solicitors, by express direction of the defendant, write to Messrs. Hime & Co. on 27th January, 1887: "Mr. William Oldham has instructed us to search the title of some property on St. Andrew's Market Square, *which he has purchased from you.*" I think this is equivalent to saying "which he has agreed to purchase from you," and that the plaintiff was thereupon entitled to shew by parol evidence that the only agreement to purchase which Mr. Oldham had entered into was the offer of the 22nd January, which became therefore properly connected and incorporated with the letter of the 27th January, so as to shew to whom the offer of the 22nd January was addressed, and to make a contract complete in every way within the Statute of Frauds.

I am of opinion, therefore, that the plaintiff is entitled to a decree for specific performance of the contract. The only objection raised by the defendant relating to the title which had not been satisfied when negotiations were broken off between them on the 19th March, 1887, was that the Vansittart mortgage was outstanding; that, however, is a matter rather of conveyance than of title, and I think the plaintiff is entitled to a declaration that the defendant has accepted the title as then existing, and the reference as to title should be limited to any changes which have since taken place in it.

The defendant should pay the costs of the action and of the motion; subsequent costs and further directions reserved.

ARMOUR, C. J.—I am of opinion that the correspondence which took place between the defendant and H. L. Hime & Co., evidenced by the letters of the 3rd, 4th, 9th, 15th, and 19th of January, respectively, together with the offer signed by the defendant on the 22nd January in the book kept by H. L. Hime & Co., and on the back of which were printed the initials "H. L. H. & Co.," being the initials of H. L. Hime & Co., constituted a sufficient agreement within the Statute of Frauds to bind the defendant.

I refer to *Allen v. Bennet*, 3 Taunt. 169; *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Jacob v. Kirk*, 2 Moo. & R. 221; *Newell v. Radford*, L. R. 3 C. P. 52; and *The Salmon Falls Manufacturing Co. v. Goddard*, 14 Howard Sup. Ct. U. S. 446.

FALCONBRIDGE, J., not having been present at the argument, took no part in the judgment.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

ONTARIO LOAN AND DEBENTURE CO. v. HOBBS ET AL.

*Landlord and tenant—Mortgage—Re-demise clause, construction of—
Creating tenancy—8 Anne ch. 14, sec. 1.*

In a mortgage of lands under the Short Forms' Act there were the usual covenants and provisoes, except the provisoes that the mortgagees might distrain for arrears of interest, and that until default the mortgagor should have quiet possession, which were omitted; and there was a re-demise clause setting out that the mortgagees leased the mortgaged lands to the mortgagor from the date of the mortgage until the date provided in it for the last payment, the mortgagor paying in every year during the term, on each of the days appointed for payment by the redemption clause, such rent or sum as should equal the amount payable on such days according to such clause, such payments to be taken to be in satisfaction of the moneys payable under such clause. There was no other provision in the mortgage which could be taken as creating a tenancy, nor was there any attornment clause.

Held, that the re-demise clause was void as a lease or as creating a tenancy, because it was for the whole term of the mortgagees' interest; and, also, because, being for a longer term than three years, it was not by deed, the mortgage not having been executed by the mortgagees.

As the mortgagor did not enter under the void lease, being already in possession, he could not be regarded as a tenant at will whose tenancy had been changed into one from year to year by virtue of payments made according to the intended lease, but must be considered as a mortgagor in possession.

Properly construed, the re-demise clause was merely a provision that the mortgagor should remain in possession until default.

Held, also, upon the evidence, that the relationship of landlord and tenant was never intended to be created in reality; and, not having been technically created, there was no tenancy in law or in fact, at a rent reserved, such as would, under 8 Anne ch. 14, sec. 1, entitle the mortgagees, as to goods seized upon the lands in question, to a preference over other creditors of the mortgagor.

THIS was an appeal by the defendants from the judgment of Rose, J., upon an interpleader issue tried before him, without a jury, at London, on the 16th September, 1887.

The appeal was argued before the Divisional Court on the 8th December, 1887.

Gibbons, for the defendants.

Becher, Q.C., for the plaintiffs.

March 9, 1888. ARMOUR, C. J.—This was an interpleader issue in which the plaintiffs affirmed and the

defendants denied that the plaintiffs were entitled as landlords of David Darvill, or otherwise under the mortgage from the said David Darvill to the plaintiffs, dated the 31st May, 1883, to be paid out of the money realized on the sale of the goods and chattels of said David Darvill, seized on the 1st June, 1887, in execution by the sheriff of the county of Middlesex, the sums of \$1,060 and \$1,042.50 due to the plaintiffs for arrears of rent or otherwise under said mortgage and payable on the 1st December, 1886, and the 1st June, 1886, respectively, in respect of the lands upon which the said goods and chattels were at the time of the seizure and sale thereof, or some part thereof, as against the execution creditors, or any, or either of them, and if so, which of them.

This issue was tried before my brother Rose, at the last Fall Sittings of this Court at London, who determined it in favour of the plaintiffs.

The question to be determined is, whether there was at the time of the seizure by the sheriff a tenancy in law and in fact, at a rent reserved, of the lands upon which the goods were seized, existing between the said Darvill and the plaintiffs as against third parties, and within 8 Anne ch. 14, sec. 1; and this is determinable by the intention of the plaintiffs and the said Darvill, as shewn by the terms of the mortgage viewed in the light of the surrounding circumstances.

The mortgage was made in pursuance of the Act respecting short forms of mortgages, and was of several parcels of land, some parts of which were at the time it was executed held by tenants under existing demises from Darvill to them.

The terms of the mortgage material to this controversy were as follows: "Provided this mortgage to be void on payment of twenty thousand dollars of gold coin of legal tender in Canada, or at the option of the mortgagees, or their assigns, the then equivalent thereof of lawful money of Canada, with interest at seven per cent. per annum, as follows: \$500 of the said principal sum to be

paid on the 1st December next (1883); \$500 on each of the months of June and December in each of the four following years, 1884, 1885, 1886, and 1887; and \$15,500, being the balance of the said principal sum, on the 1st June, 1888, and the interest at the rate aforesaid, likewise of gold coin or its equivalent as aforesaid, on the unpaid principal from the first day of the month of June now, 1883, to be paid semi-annually on the first day of each of the months of June and December in each year until the said principal sum and interest shall be fully paid and satisfied. The first of said semi-annual payments of interest to become payable on the 1st December, 1883, and taxes and the performance of statute labour. The mortgagor, his heirs or assigns, having the privilege of paying \$100, or any multiple thereof not exceeding \$1,000, on account of the said principal moneys in advance on the day of the date of any of the above mentioned half-yearly payments.

“The said mortgagor covenants with the said mortgagees that the mortgagor will pay the mortgage money and interest and observe the above proviso, and that on default the mortgagees shall have quiet possession of the said lands, and that the mortgagor will execute such further assurances of the said lands as may be requisite; and the said mortgagor doth release to the said mortgagees all his claims upon the said lands subject to the said proviso. Provided that the said mortgagees, on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands. Provided also that any such sale may be for cash or on terms of credit, and that in case of default of payment as in foregoing proviso mentioned for three months, the foregoing powers of entry, leasing, and sale, or any of them, may be exercised without any notice having been given as therein provided. And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured, undisturbed by the mortgagees, or their assigns, he the

mortgagor paying therefor in every year during the said term, on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sum as equals in amount the amount payable on such days, respectively, according to the said proviso, without any deduction; and it is agreed that such payments, when so made, shall, respectively, be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso. Provided always and it is agreed that in case any of the covenants or agreements herein of the mortgagor, his heirs, executors, administrators, or assigns, be untrue, or be unobserved or broken, at any time, the mortgagees, their successors or assigns, may, without any previous demand or notice, enter on the said lands, or any part thereof, in the name of the whole, and take and retain possession thereof, and determine the said lease. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable; and this proviso shall also apply as fully in case of default in payment of any instalment of principal hereby secured as if such instalment were interest."

The provisions 15 and 17 of the Act respecting short forms of mortgages, "provided that the mortgagor may distrain for arrears of interest," and, "provided that until default of payment the mortgagor shall have quiet possession of the said lands," were omitted from the mortgage, and the mortgage contained no attornment clause, and the clause beginning "and the mortgagees lease" was called in the margin "re-demise clause," and in hereafter referring to it I will adopt that name.

There is nothing in this mortgage, if I except the re-demise clause, which I shall presently discuss, which created any tenancy whatever in the mortgagor, and which by reason of a tenancy having been created prevented the mortgagees from taking possession of the lands immediately upon the execution of the mortgage, and the mortgagor upon the execution of the mortgage became at

most a tenant by sufferance: *Doe Roylance v. Lightfoot*, 8 M. & W. 553; *Doe Parsley v. Day*, 2 Q. B. 147; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Lows v. Telford*, 1 App. Cas. 414; and the payment by him of mortgage moneys afterwards did not alter such tenancy: *Doe Rogers v. Cadwallader*, 2 B. & Ad. 473.

The first difficulty in treating the re-demise clause as a lease, or as creating a tenancy, is that it is for the whole term of the plaintiffs' interest as mortgagees of the lands, until the date provided for the last payment of the mortgage moneys.

The next difficulty is, that it is for a longer term than three years and is not by deed, the mortgage not having been executed by the plaintiffs, the mortgagees, and it is therefore void.

This is not an attornment clause nor is it at all like the attornment clause which was the subject of discussion in *Morton v. Woods*, and the law laid down in *Morton v. Woods* does not therefore apply to this case. See *Morton v. Woods*, L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; *Re Threlfall*, 16 Ch. D. 274.

The lease being void, was any tenancy created under or by virtue of it, or by reason of anything done by the mortgagor with reference to it?

If one enters under a void lease he becomes a tenant at will, it is said, and when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy: *Woodfall*, L. & T. 11th ed. 203.

But in this case the mortgagor did not enter under this lease, for he was in possession at the time, and so far as appears by the evidence, his possession continued to be that of a mortgagor in possession and not that of a tenant.

The payments made by him were so made by him as mortgagor, of money payable by him as such under the proviso and his covenant in that behalf, and were not

made by him as a tenant, or as rent payable under any lease.

In order to entitle the plaintiffs to succeed in their contention it was necessary that it should appear, not only that the relationship of landlord and tenant between them and Darvill had been technically created, but that it had been created in reality. See *Trust and Loan Co. v. Lawrason*, 6 A. R. 286; *Ex parte Voisey*, 21 Ch. D. 442; *Thomas v. Cameron*, 8 O. R. 441.

In my opinion such relationship was not technically created, and it is manifest that it never was intended to be created in reality.

The application for the loan shews nothing to indicate that the creation of such a relationship was contemplated and there is nothing in the mortgage to indicate that such a relationship was required to be created for the better securing the payment of the mortgage moneys, such as I find to be the case in mortgages where the subject has been under discussion in England.

And it is a very significant fact that the provision for distraining which appears in the Act respecting short forms of mortgages, was omitted from this mortgage, which purports to have been made in pursuance of that Act.

Suppose for a moment this controversy had assumed a different form, and that the second mortgagees were attempting to charge the plaintiffs, as mortgagees, with rent which they might have received, could it have been successfully maintained that they were chargeable under the circumstances shewn here? I think not, and the evidence of Mr. Bullen, the plaintiffs' manager, shews how vigorously, so far as evidence could go, the plaintiffs would have resisted such an attempt.

I am inclined to think that the proper construction to be put upon the re-demise clause is to treat it as a provision merely that the mortgagor shall remain in possession until default, and I do not think that any greater effect can be given to it. In my opinion the finding must be for the defendants.

FALCONBRIDGE, J., concurred.

STREET, J., having been engaged in the case when at the bar, did not sit during the argument, and took no part in the judgment.

Judgment for the defendants.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE COUNTY OF VICTORIA v. THE
CORPORATION OF THE COUNTY OF PETERBOROUGH.

*Municipal corporations—Boundary line roads—Deviations—Adjoining
counties—Liability.*

The counties of Victoria and Peterborough adjoin each other, and up to 1863, when they were disunited, were united for municipal and other purposes. The boundary line road between these counties deviated in several places owing to natural obstructions. At the place in question, where the deviation was wholly in the township of Verulam, in the county of Victoria, and which deviation was recognized as a deviation from the boundary line, two bridges were built, during the union, at the joint expense, and were treated as subject to the joint control and liability. By 42 Vic. ch. 47 (O.), which came into force on 5th March, 1880, a portion of the township of Harvey, in the county of Peterborough, adjoining Verulam, including the part opposite to the place in question, was detached from Harvey and joined to Verulam for municipal and other purposes, as is enacted, as if it had always been part of Verulam. In 1879 a new bridge was built at the said place, and an arbitration had between the counties, and on May 18th, 1880, after the said Act came into force, an award was made settling defendants' share of the cost, which they paid. In 1887, the bridges having got into disrepair, the plaintiffs appointed their arbitrator to settle the cost of repair, &c. ; but defendants refused to join in the arbitration, contending that since the 42 Vic. no liability therefor was cast on them. The inhabitants of certain portions of the adjoining townships in Peterborough continued to use these bridges, which were their only means of access to their county town and market.

Held, that the road at the said place must still be considered the boundary line road, and defendants were liable for the maintenance and repair of the bridges.

THE statement of claim alleged that the county of Peterborough adjoined the county of Victoria on the east, and the road upon the boundary line running northward, sep-

arating the two counties, deviated in several places owing to obstructions, such as rocks or wide bodies of water; but at the village of Bobcaygeon, which was situated in the township of Verulam, in the county of Victoria, adjoining said boundary line, there was, owing to such natural obstructions, a deviation of such boundary road, which for such distance was wholly within the county of Victoria, and after passing through the village of Bobcaygeon northward, again became the boundary line between the two counties, and there was no road upon the boundary line between the point where it so deviated, and where it became the boundary line to the north of Bobcaygeon: that upon the deviation of the said road in the said village of Bobcaygeon were built bridges across the river, which were originally built when the counties of Peterborough and Victoria were united counties, and have been always considered to be under the joint control of the two counties until lately, when the defendants refused to admit any liability for their repair, or to appoint an arbitrator under the provisions of the Municipal Act.

The additional allegations contained in the statement of claim, are set out in the judgment.

The plaintiffs asked for a declaration that defendants were legally liable for the maintenance and repair of such bridges, and that they were under the present control of the said counties; and for a mandamus to compel the defendants to appoint an arbitrator to ascertain the amount of the defendants' liability.

The action was tried before Robertson, J., without a jury, at Lindsay, at the Fall Assizes of 1887, who delivered the following judgment, in which all the facts are fully stated.

Moss, Q. C., and Hudspeth, Q. C., for plaintiffs.

Lash, Q. C., and E. B. Edwards, for defendants.

December 6, 1887. ROBERTSON, J.—These two counties were formerly united for municipal and all other purposes,

and during the union the bridges in question were erected and maintained by the united counties.

Afterwards in 1863, the counties having been disunited, the bridges were still maintained at the joint expense of the counties under the provisions of the Municipal Institutions Act, which requires county councils to erect and maintain bridges over rivers, forming or crossing boundary lines between two municipalities (other than in the case of a city or separate town).

The bridges in question were not on the boundary line proper, between these two municipalities; but, owing to causes mentioned in the plaintiffs' statement of claim, the boundary line could not be utilized for road purposes, and a road commencing on lot No. 18, in the 10th concession of Verulam, in the county of Victoria, from the original boundary line road, was constructed as a deviation of the boundary line road, and from thence westerly and southerly through the village of Bobcaygeon, by a bridge across what is called the "Big Bob" or "North River," which crosses the original boundary; thence southerly to the line between lots 14 and 15, in said 10th concession; thence easterly along the line between lots 14 and 15, to the original boundary between the two counties; thence southerly along the boundary, across what is called the "Little Bob" river, where there is also a bridge.

This road was a deviation of the boundary, and was recognized by both municipalities, up to 1st March, 1880, as being such, and for the maintaining of the bridges on which, they held themselves to be jointly liable, and contributed thereto.

The township of Harvey in the county of Peterborough lies east and alongside of the township of Verulam, in the county of Victoria, and there is a sheet of water of considerable dimensions, called Pigeon Lake, extending from the southern limit of Harvey along the west side thereof to some distance north of and opposite to the before mentioned lot 18, in the 10th concession of Verulam, leaving, however, a narrow strip of land to the west thereof between

the lake and the original boundary line between the counties, which strip of land was, with the rest of the township, laid out into lots and numbered 1 to 15 inclusive, and formed part of the 19th concession. The "Big Bob" or "North River," crosses the boundary between lot 15, in the 19th concession of Harvey, and lot 16, in the 10th concession of Verulam, these two lots being opposite to each other. The "Little Bob" river also crosses the boundary between lot 13, in the 10th concession of Harvey, and lot 14, in 10th concession of Verulam, these lots being also opposite to each other.

In March, 1879, the Legislature passed an Act 42 Vic. ch. 47, (O.) which declared that "From and after first day of March next," (1880), "all that portion of the township of Harvey, which lies west of Pigeon Lake, consisting of all the lots in the nineteenth concession from one to fifteen, inclusive of both numbers, shall be detached from the municipality of the township of Harvey, and shall be attached to the municipality of the township of Verulam, in the county of Victoria, for all municipal, judicial, electoral, and school purposes, and also for the purpose of registration of titles as if the same had always formed part of the said township of Verulam; and the rest of the said township of Harvey shall be entirely separated from the portions so detached for all purposes whatsoever."

Since the coming into force of this Act, the municipality of the County of Peterborough contends that it is not liable to contribute to the maintenance of the bridges in question, for the alleged reason that "since last mentioned date (1st March, 1880), the waters of Pigeon lake have formed the only boundary between the said counties from the northern limit of the township of Ennismore to the northern boundary of lot 15, in the 19th concession of Harvey, a distance of about eight miles," and that "since last mentioned date the bridges in question have ceased to be upon the boundary line between the said counties, but the same have ever since been, and are wholly within the county of Victoria, and under its sole control, and have

ever since been kept in repair by the plaintiffs (county of Victoria) alone; and the defendants submit that they are not responsible for the repair or maintenance of said bridges, or of either of them."

The evidence shewed that the inhabitants of the township of Galway, in the county of Peterborough, which township is bounded on the west by the boundary line between Peterborough and Victoria, and forms the north-west angle of Peterborough, as well as the inhabitants of the north-west angle of Harvey, travelling to the town of Peterborough, use the bridges in question, the road by and across them being the only convenient way they have of reaching that point.

In 1879 a new bridge was erected over the "Big Bob," or "North River," and the county of Peterborough submitted to an arbitration in reference to the amount which it should contribute towards its construction; and, in accordance with the award made on the 18th May, 1880—after the Act detaching the lots in the 10th concession of Harvey from that township came into force—paid \$1,955.45 as their share. Since then the bridges in question have fallen into disrepair; and, on the 28th January last, (1887) the county council of Victoria passed the necessary by-law appointing an arbitrator on behalf of the municipality to arbitrate with the municipality of the county of Peterborough, relative to the repairs and maintenance of the bridges in question, and the statutory notices were served on the warden of the municipality of the county of Peterborough, to do likewise; but the latter refused to take any steps in reference thereto; and another by-law was passed by the council of Victoria, authorizing the warden of that municipality to apply to the Lieutenant-Governor in council, to appoint an arbitrator on behalf of the municipal corporation of Peterborough, to arbitrate in the premises, as provided for in the Municipal Institutions Act.

This application was made in due form. Whereupon it was agreed that the question of liability should be decided by this Court; and that should the defendants be held

liable to contribute towards the maintenance and repair of the bridges in question, then they could appoint an arbitrator as required by the Municipal Institutions Act.

Sub-sec. 2 of sec. 535, of the Act, R. S. O. ch. 184, (1887) declares that "a road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section," (535) "although such road may deviate so that it is in some place or places, wholly within one of the municipalities, and a bridge built over a river crossing such road where it deviates as aforesaid shall be held to be a bridge over a river crossing a boundary line, within the meaning of this section."

Looking at the map produced at the trial, and taking into consideration the reasons which admittedly existed from the first, for leaving the boundary line as a road capable of being opened and used for travel as a public highway, at the point opposite lot 18 in the 10th concession of Verulam, and deviating westerly through the village of Bobcaygeon; thence southerly across the "Big Bob," or "North River;" thence easterly through lot No. 14, to the original boundary; thence southerly across the "Little Bob" river, it is impossible, in my judgment, to hold that the mere fact of detaching the lots mentioned in the 19th concession of Harvey, from that township, and attaching them to Verulam, by which means the boundary line between the plaintiffs and defendants, from and inclusive of lot 1, to and inclusive of lot 15, in the 19th concession of Harvey, is removed to the east thereof, and now runs through the centre of Pigeon Lake, has relieved the municipality of the county of Peterborough from liability to bear its fair share of the maintenance of the bridges in question.

There is no doubt, that had the lots taken from Harvey, by the Act 42 Vic. ch. 47, (O.) originally been a part of Verulam, the same reasons would have existed for making the deviation of the road through the village of Bobcaygeon as existed while they were a part of Harvey. The boundary between the two counties could not have been utilized as a public highway then, any more than it could before

the passing of that Act—the deviation would of necessity, have taken place under such circumstances, just as certainly as it did when the boundary between the respective counties west of Pigeon lake existed along the rear of the 19th concession of Harvey.

The statute does not place any limit as to the “deviation,”—it might in some cases be necessary to “deviate” much further than it does in this case—the words of the statute contemplate this, and provide that “although such road may deviate so that it is *in some place or places wholly within one of such municipalities, &c.*” In fact it is difficult to understand how it could “deviate” at all, except by passing “wholly within one of such municipalities.” The word “deviate” means to leave the original, or established course, and to take another course therefrom; in doing this, how is it possible to avoid going “wholly within one of such municipalities,” &c. And having once done so, the evident intention of the Act is to enable the road to be made where it is most convenient and most useful to the two interested municipalities.

There was reason and justice for making the detour in the first place; and the same reason prevails here—the same obstructions to opening of the original road allowance still exists.

And as it is admitted, that the inhabitants of the county of Peterborough are to the same extent now, as they always have been, obliged to use these bridges in order to enable them to reach their market and county town, the same justice demands that the defendants should as formerly, contribute to the building and maintaining of the bridges in question.

I, therefore, am of opinion that these bridges should be declared to be under the joint control and liability of the counties of Victoria and Peterborough, notwithstanding they are upon a deviation of the boundary line between the two counties, and wholly within the county of Victoria; and that the municipality of the county of Peter-

borough, is liable to contribute to the maintenance and repair of the said bridges ; and that the defendants shall pay the plaintiffs' costs of this action.

Judgment for plaintiff.

[COMMON PLEAS DIVISION.]

SMITH V. MILLIONS.

Survey—Plan, part of description in deed—Effect of.

The rule of construction in cases of private plans, where a deed or plan is referred to as part of the description, is to read it into the deed.

Carter v. Grasett, 10 S. C. R. 105, followed.

In an action to determine the boundary between certain lots on a plan, the defendant's surveyor, instead of being governed by the plan, went behind it, making a new survey ; and also took the apparent angles on the plan instead of the measurements.

Held, erroneous.

THIS was an action of trespass to determine the boundary line between lots 2 and 3 according to Gilmour's plan of certain lots in Ottawa.

The cause was tried before Robertson, J., at Ottawa, at the Fall Assizes of 1887.

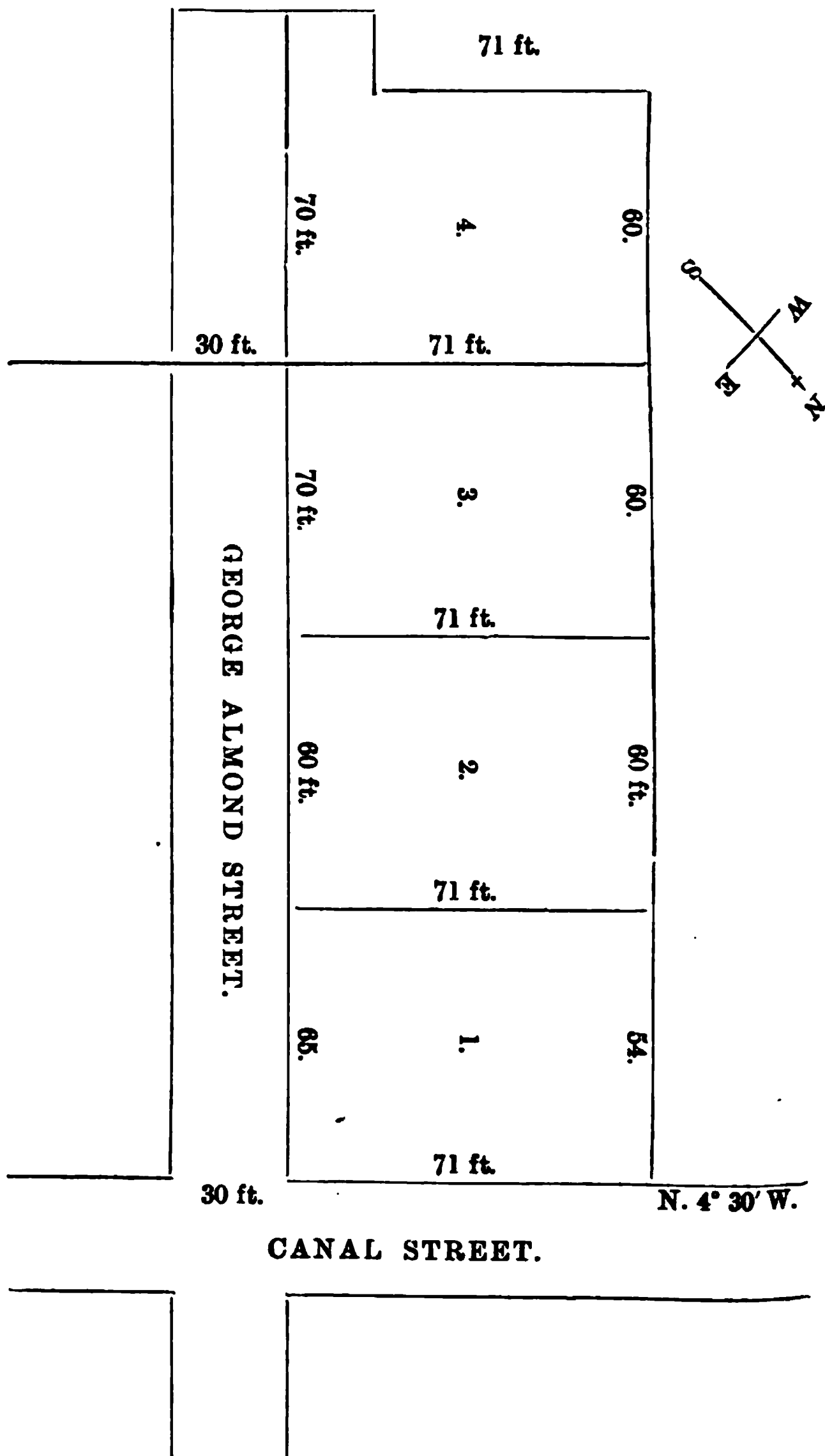
On the next page is a rough sketch of the plan so far as is material.

The learned Judge found for the defendant.

In Michaelmas Sittings, 1887, *Walter Cassels*, Q.C., moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

In the same Sittings, December 15, 1887, *Walter Cassels*, Q. C., supported the motion, and referred to

BY ESTATE.



Artley v. Curry, 29 Gr. 243; *Carter v. Grasett*, 10 S. C. R. 105; *Land Surveyors' Act*, 50 Vic. ch. 25, sec. 60, (O.)

Miller, contra.

December 23, 1887. ROSE, J.—One O'Brien, owning the land to the west of Canal street, employed Gilmour to survey the lots in question and make the plan which was registered. Assuming for the present that the west side of Canal street is an ascertainable boundary, there has been found no difficulty in fixing the south or front boundary line of lots 1, 2, 3, &c. The surveyors on both sides agree as to this. Indeed, there is an acknowledged post fixing the south-west angle of lot 4; and measuring on the ground from it the distances marked on the plan, easterly along the north side of George Almond street to the apparent west boundary of Canal street, the measurements correspond with those on the plan.

This dispute has arisen with reference to the rear or west boundary of the lots.

It appears that when the survey was made by Gilmour, he planted a post at the north-west angle of lot 4; and it is reasonably clear that that post was west of the land covered by his patent—in other words that he included in the plan a portion of the By estate, say about 14 feet.

The surveyor for the plaintiff, Mr. Wolff, assuming that from previous surveys he knew where was the west side of Canal street, found the intersection of the north side of George Almond street with the western boundary of Canal street.

What he then did appears from the following evidence:

“ I then measured along the north side of George Almond street from the western boundary of Canal street up to what is known as the south-west angle of lot 4 on the north side of George Almond street. There stands what is recognized to-day as a post belonging to the original survey of the subdivision of this block. I found that there was sufficient width there to allow the front of lot number 1 to be 65 feet wide. Between Canal street and this original

post, I found sufficient width to allow the lots 1, 2, 3 and 4, on the north side of George Almond street to be the widths shown on the original plan. These are the fronts of the lots. I then went to the intersection of the rear line of lots 1, 2, 3, and 4, with the western boundary of Canal street. From the western boundary of Canal street I measured westerly along the rear of lots 1, 2, 3, and 4. I measured 54 feet for lot 1, where I planted a post; 60 feet for lot 2; 60 feet for lot 3. After measuring 60 feet across lot 2, I planted a post as the limit between lots 2 and 3. That post is shewn on this plan (exhibit 6) and marked "Wolff's post." I then measured 60 feet further across lot number 3, then westerly 60 feet again for lot number 4—all on the same bearing—60 feet for lot number 4, where I put down a small peg out of view, a private mark.

Mr. Mahon—That was the full length of this lower line? The full length as shown on the original plan. That would run right to the north-west angle of that block, according to Mr. Gilmour's old plan, (exhibit 4.)

What evidence did you take to ascertain the correctness of your final point? Knowing that Mr. Michael O'Brien was the original proprietor of block 4, I went to him for evidence. I swore him and took his affidavit and reduced it to writing. Exhibit 7 is it. From what he swore to I left the post that I had planted between 2 and 3—the post I had already planted I left there—considering it in the correct position.

That is from what he told you as to the final point? Yes, I found that his affidavit and the showing on the ground agreed.

The Court—Did you swear him before he pointed it out? I first established a post there, and then he swore that the post he saw there was within six inches of where the original post stood. As it turned out from my chaining he was within four inches.

From what he swore what did you do? I planted a post in place of the peg I had put there.

Mr. Mahon—From the evidence you got from him you believe that was the correct final point? Yes.

Measuring from that post as the final point to Canal street you would find the lots the same width as they are marked in Mr. Gilmour's plan? Exactly the same.

You find the land is all there? It is all there.

The short of it is that you find that post which you found between 2 and 3 is correct? Yes.

The Court—Then you found that your survey was in accord with the original plan? I laid down the distances as shown on the original plan, and they agreed with the affidavit that was given me by Michael O'Brien.

How did you find the line between lots 2 and 3? From what did you find the line between 2 and 3 as you laid it down on your plan? There was no post there. I put down a post, and then I connected that post with a post I had planted at the front on the north side of George Almond street.

That survey shews then what? That survey shews that the owner of lot number 3 is encroaching on lot number 2 by 10 feet at the rear.

Mr. Mahon—I think that you have stated already that you found that the width of each lot according to that survey tallied according to this plan? Where I measured across the front, where I found an original post, it tallied exactly.

The surveyor employed by the defendant, a Mr. Lewis, went behind the plan, ascertained the amount of land O'Brien owned according to the description in his patent, and divided up the land according to a scheme of his own, which corresponded with neither the size, shape, nor measurements of the lots according to the plan filed.

According to Gilmour's plan the lots 2 and 3 appear to be rectangular, and Lewis endeavors to run a boundary line between 2 and 3 which will give two right angles at the point on the north boundary of George Almond street. His plan gives lot 1, 52½ feet on the north. Lot 2, 53 feet. Lot 3, 59 feet 9 inches. Lot 4, 54 feet. His south or front measurements correspond with Wolff's save that by measuring from the Ottawa river he changes the western boundary of Canal street, and thus varies slightly the measurements of the south boundaries of the lots.

It seems to me the defendant's surveyor has fallen into two errors, one was in going behind the plan to make a new survey instead of being governed by the plan; and, secondly, in being governed by the apparent angles shewn on the plan instead of the measurements.

I am also of the opinion that the course taken by the plaintiff's surveyor was the correct one, and that his evidence must determine the case.

The rule of construction in cases of private plans is laid down by Mr. Justice Strong, in *Grasett v. Carter*, 10 S. C. R. 105, namely, that the plan must be read into the deed—when referred to—as part of the description. Lot 2 was sold by O'Brien prior to lot 3. Reading the deed, which was of lot 2, according to the plan, it seems to me the mode of ascertaining the boundary lines is plain, viz., find a point in the north boundary of George Almond street 65 feet westerly from the westerly limit of Canal street; then run westerly along such northerly limit 60 feet, for the southern or front boundary; then find a point 71 feet north of the northerly limit of George Almond street, being 54 feet westerly from the westerly limit of Canal street, and continue such line westerly, parallel to the southern boundary, 60 feet, to determine the north or rear boundary of lot 2.

To find the eastern and western boundaries of the lot, draw lines from the respective termini of the front boundary to the corresponding termini of the rear boundary regardless of the angles made. The lot must be equilateral; but the angles at the south-east and south-west corners may or may not be right angles.

When O'Brien sold number 3 his purchaser would commence his description on the front boundary 125 feet west of Canal street, and on the rear 114 feet from the same boundary.

When the purchaser of lot 4 endeavored to take his land according to the measurements on the plan he would find his description lead him to a point west of O'Brien's land; but that would be a matter which he would have to settle with his vendor—the purchasers of lots 2 and 3 would have no concern with it.

This determination corresponds with the work on the ground; but, if it did not—according to Strong J., in *Grasett v. Carter*, at p. 114, the work on the ground not

being referred to in the deed,—the description would govern.

The result is, that we do not take the same view as the learned Judge at the trial, who adopted the survey of Lewis.

In our opinion the judgment for the defendant must be set aside, and judgment entered for the plaintiff, with costs.

I think Wolff's survey must be taken as determining the western boundary of Canal street, as the more likely to be correct as the measurements can be checked from the south-west and north-west angles of lot 4.

We cannot but regret so much litigation over so small a matter ; but unfortunately there is no less expensive mode provided for settling such a dispute if the parties desire to resort to the Courts for a settlement.

GALT, C. J., and MACMAHON, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

RYAN V. MCKERRAL.

Bills of exchange and promissory notes—Third person becoming party after maturity without any consideration—Liability—Endorsement of payment of interest on back of note—Extension of time of payment—Discharge of surety.

Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time of payment, such third person is not liable thereon.

Crofts v. Beale, 11 C. B. 172, followed; and *Currie v. Misa*, L. R. 10 Ex. 153, 1 App. Cas. 554, and *McLean v. Clydesdale Banking Co.*, 3 App. Cas. 95, distinguished.

An endorsement on the back of a note of the payment of interest up to a future date beyond the maturity of the note, in the absence of evidence of mistake, is to be deemed an extension of time for the payment of the note to such date, so as to discharge a party thereto who is merely a surety for the payment thereof.

THE plaintiff sued as the bearer of two promissory notes, purporting to have been made by the defendant, and two other persons, the father and mother of the defendant. The first note, in point of time, bore date the 26th day of January, 1882, and was for the sum of \$200, payable to the plaintiff or bearer one month after date. The second note bore date the 12th day of April, 1882, and was for the sum of \$300, payable to one John Ryan or bearer three months after date.

The action was tried before Galt, J., without a jury, at Chatham, at the Spring Assizes of 1887.

On the trial the following facts were disclosed by the evidence:

Both notes were given for money lent by the plaintiff to M. S. McKerrall and P. E. McKerrall.

The defendant signed the note for \$200 after it had been made by the other makers, and delivered to the plaintiff as a completed note. The exact date of signing did not appear; but the evidence preponderated to shew it was not signed till after it had become due, and was signed at the request of the plaintiff, who then held it, and who

represented to the defendant that his father wished him to sign it. This note had been sued on by the plaintiff in the Division Court in 1882, when the plaintiff was nonsuited, on the ground that there was no consideration for the defendant signing the note.

On the \$300 note, which became due on the 15th July, 1882, there were the following endorsements:

"Chatham, April 12, 1882. By cash \$3.75. Chatham August, '82. Paid *interest* on this note up to 14th Oct., '82. I hereby abandon all excess over and above \$200. William Ryan."

The endorsement was subsequently erased by a line with a pen being run through the words, and then afterwards was written across the former words "not abandoned."

When the plaintiff sued in the Division Court he abandoned all his claim except \$198.24, that being the amount sued for. Before suing in the Division Court,—the summons in that Court having been issued on the 7th day of November, 1882,—the plaintiff brought an action against all the makers of both notes in the Queen's Bench Division of the High Court on the 18th day of October, 1882, which action, as against the defendant in this suit, he subsequently discontinued.

The endorsements on the \$200 note were as follows:

"Chatham, Feb. 28, 18"(the rest of the date was torn off); "*Interest* paid to 26th March. Interest paid up to 26th July, 1882, four months. Oct. 14, interest paid up to date, \$3. Paid in groceries \$2.60 on the 20th Oct."

The groceries were got at the defendant's store.

The note for \$200 had two three cent hills stamps on, and a third seemed to have torn off. The two that remained on were sufficiently cancelled.

The \$300 note had four three cent bill stamps on, all cancelled.

The defendant set up and relied on the following defences:

1. That there was no consideration for his signing the notes.

2. The notes were not sufficiently stamped.

3. The defendant was only a surety for the other makers of the note, and the plaintiff had discharged him by giving time to the other makers for a valuable consideration; as to the \$200, it was subsequently included in the \$300; and as to the \$300 note, the plaintiff having abandoned \$100 of his claim, was, at most, entitled to recover in respect of that note, \$200 and interest,

The learned Judge gave judgment in favor of the plaintiff for the full amount of the claim, \$635, with costs, finding that the defendant made the notes: that he signed them at the request of P. E. McKerrall, his father: that no consideration was given by the plaintiff to him; but he signed them for the accommodation of his father: that the action in the Division Court having been dismissed on the objection of the defendant, on the ground that the action should have been brought in the High Court, he could not avail himself now of the proceedings of that Court; and overruled the defence.

The learned Judge further found the note for \$200 was duly stamped: that the \$200 note was not part of the consideration for or included in the \$300: that the plaintiff did not, for valuable consideration, extend the time of payment of the \$300 note, nor did he extend it at all.

In Easter Sittings, 1887, *Houston* moved, on behalf of the defendant, pursuant to notice of motion, to set aside the judgment in favor of the plaintiff, or to enter a nonsuit or judgment for the defendant, or for a new trial, on the ground that plaintiff was not entitled to judgment for the reasons above mentioned.

During the same Sittings, June 1, 1887, the motion was argued; but, in consequence of the death of Cameron, C.J., before judgment was delivered, a re-argument was directed.

In Michaelmas Sittings, December 13, 1887, the re-argument took place.

Houston supported the motion, and referred to *Catton v. Simpson*, 8 A. & G. 136; *Gardner v. Walsh*, 5 E. & B. 83; *Crofts v. Beale*, 11 C. B. 172; *Suffell v. Bank of England*, 9 Q. B. D. 555; *Greenough v. McClelland*, 30 L. J. N. S. Ex. 15; *Chalmers on Bills*, 2nd ed., 223-5; *Byles on Bills*, 14th ed., 148, 237.

Aylesworth, contra, referred to *Byles on Bills*, 14th ed., 146; *Currie v. Misa*, L. R. 10 Ex. 153, 161, 1 App. Cas. 534; *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95; *Swift v. Tyson*, 16 Pet. 1; *Greenough v. McClelland*, 30 L. J. N. S. Ex. 15.

February 11, 1888. ROSE, J.—This case was argued before the full Court on the 1st June, 1887, the late Chief Justice presiding, and judgment was reserved.

He wrote a judgment which I was considering at the time of his unfortunate death. I did not dissent from his view of the law; but desired to look with care into the cases referred to on the argument. It thus became necessary to have a re-argument, which took place before my brother MacMahon and myself on the 13th December last.

I have had, therefore, the advantage of two arguments, and the opportunity of consultation with the different members of the Court, and, having examined the cases cited with such attention as has been in my power, especially the cases of *Currie v. Misa*, 1 App. Cas. 534, and *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95, so much relied upon by Mr. Aylesworth, I have come to the same conclusion as that arrived at by the late Chief Justice, and for the same reasons.

I therefore adopt his judgment as my own, not hoping to be able to present my views in so clear and concise a manner, and being desirous to preserve to the parties the result of his labor, and to the profession his formulated views upon the points raised for consideration.

I will therefore read his judgment as expressing my own views, and announce the result arrived at by him as the declaration of my opinion as to what must be the result of this motion:

"The only findings of fact of the learned Judge that are involved in any doubt are two, namely, that the notes were signed by the defendant at the request of his father; and that the time for payment of the note for \$300 was not extended for valuable consideration, or at all.

If the fact of a request by the principal debtor to the defendant to sign the note would make any difference, I should be inclined to think the weight of probability was in favor of my learned brother's finding. The time the defendant signed either note is left in much obscurity in the evidence. It is not improbable it was after the maturity of the \$300 note that defendant signed both notes. He speaks of it being at the end of June or beginning of July that he signed the \$200 note; and it may be it was then that the plaintiff became desirous of getting further security. But the defendant's evidence is so confused and contradictory it is difficult to place any reliance on it, not because the defendant is untruthful, but because his memory is defective, and he states things as facts that he has, in the absence of any actual recollection, reasoned himself into the belief of.

I will, therefore, consider the legal rights of the parties, on the assumption that the finding of my learned brother is right: "The defendant signed the notes at the request of his father: that there was no consideration money from the plaintiff to the defendant to sign the notes; but that they were signed for the accommodation of the defendant's father."

Then upon the facts, two questions are presented:

1. Can a third party be liable on a note made by other parties, and signed by such third party after the note has been a completed note as far as the intention of the parties to it is concerned, or signed by him after it became due without consideration moving directly to the third party, or without there being an agreement on the part of the holder of the note to extend the time of payment?

2. Is the endorsement on the back of a note of interest paid up to a future time, in the absence of evidence of mistake, to be taken as conclusive evidence that the time for payment of the note was extended up to the time to which the interest purports to have been paid, so as to discharge a surety for the payment of the note?

Upon the first question, were it not for the case of *Currie v. Misa*, L. R. 10 Ex. 153, affirmed in appeal, 1 App. Cas. 554,

and approved of in *McLean v. Clydesdale Banking Co.*, 9 App. Cas. 95, I should have thought there was no room for doubt on the authorities that the defendant would not be liable.

The case of *Crofts v. Beale*, 11 C. B. 172, cited by Mr. Houston, is undistinguishable in principle from the present case. There the defendant gave a note payable on demand, with interest, as collateral security for a debt due from one J. S. to the plaintiff. In an action on the note the defendant pleaded that he gave it as collateral security for the debt of J. S.: that the defendant was not liable to pay the debt or to give the note as security for the same; and there never was any consideration for the making of the note other than as aforesaid. After verdict the plea was held to be a good plea of no consideration; and a verdict for the defendant thereon was upheld.

In *McGillivray v. Keefer*, 4 U. C. R. 456, the Court was unanimously of the opinion that a note given by A to B for a debt due by C to B, upon no consideration of forbearance, could not be enforced, especially if the note was given without a request from C. The case was apparently decided upon the authority of *Nelson v. Serle*, 4 M. & W. 795. Sir John Robinson, Chief Justice, seems to have entertained very strongly the opinion that the debt of a third party was a good consideration for a promissory note. At page 457 he said: 'The case of *Nelson v. Serle* was decided in error, overruling a judgment of the Exchequer. If that case is to be treated as deciding that a promissory note, given by A for the debt of B, is invalid, it seems to be difficult to reconcile it with the opinions expressed upon very good authority * * * I confess I have always been under the impression that to support a promissory note, even as between the maker and payee, the debt of a third party would be a good consideration. Again, on page 458, he says: When one sees how long it was debated whether a note or bill intended to be a mere gift to the payee could not be enforced, and reads the arguments and judgments in these cases, it is difficult to say that a note given for the debt of another should not be binding. I think it is generally, if not universally, understood to be so, and seems to have been assumed in *Baker v. Walker*, 14 M. & W. 465. But certainly the law, where the point has been examined, seems to be that a consideration of some sort is necessary to support the promise made in a promissory note even as between the

original parties, and on this record none appears ; for the statement amounts only to this, that the defendant was requested by the plaintiff to give his note on account of another man's debts, without any stipulation of forbearance towards the original debtor, and without agreeing to discharge that debtor, and without any privity with him, and that he did on such request make the note.'

The other members of the Court, in arriving at the same conclusion, intimate that if the original debtor requested the defendant to make the note, it should have been averred ; but they do not say what the effect of that would have been without more appearing. A naked request would scarcely amount to consideration from one who had no legal claim to make such request. The general rule of law is, that one cannot make himself responsible for the debt or miscarriage of another, except by writing ; and there must be a consideration to support the undertaking, otherwise such undertaking is a mere *nudum pactum*.

In the case of a promissory note consideration for making or endorsing is implied, and the burden of proof rests with him who sets up the defence of no consideration. But the want of consideration may be shewn ; and, if shewn, is a good defence against liability on the note, except where, from the negotiable character of the note, an innocent holder, taking it before due, in the ordinary course of business, or for valuable consideration, is protected from such defence. Taking a note on account of a debt is taking it in the ordinary course of business, and for valuable consideration : *Cross v. Currie*, 5 A. R. 31 ; *Currie v. Misa*, L. R. 10 Ex. 153.

The last case is the one that supports most strongly the plaintiff's contention in the present case. It was there held that a cheque drawn in respect of a consideration which had failed, and did not exist at the time the cheque was drawn, was a valid security in the hands of a banker, who received it on account of a customer who could not have enforced payment in his own name, though the banker made no fresh advance or changed his position to his customer.

The case, however, is quite distinguishable from the present. The customer of the bank had sold four bills of exchange to the defendant, drawn by himself upon P. at Cadiz, and had drawn upon him for the amount, and deposited the draft with the plaintiffs, who had been

pressing for a reduction of the amount. The defendant, on the day the drawer of the bills of exchange failed, gave his cheques upon his own bankers to the plaintiffs, and took up the order or draft that the drawer had given to them upon the defendant. On discovering that the drawer of the bills had failed, the defendant notified the bank not to pay his cheque. The plaintiffs sued; and it was held the giving up the order was some consideration for the cheque, and that the antecedent debt due by the drawer of the bills of exchange for plaintiffs was a sufficient consideration to enable them to enforce payment of the cheque.

The case therefore furnishes but little assistance in the decision of the question of the defendant's liability in the present case.

Mr. Aylesworth urged that the fact of the notes sued on being negotiable gave the plaintiff a right to enforce payment, though he might not have been able to do so if they had not been payable to bearer. I do not see how this circumstance can make any difference where the action is between the original parties to the note. There would seem to be no doubt whatever that an antecedent debt is a good consideration to support the title of the creditor to negotiable paper received from his debtor, though his debtor himself could not support an action thereon. This is an exception to the maxim *nemo dat qui non habet*.

In the present case, if the defendant's father had taken the note with the defendant's name upon it to the plaintiff, and delivered it to the latter on account of the father's indebtedness, if the note had not matured there would have been no question as to the legal liability of the defendant. But this is not the case. The note for \$200 was unquestionably a completed note, if not overdue when the defendant signed. There was therefore no question of forbearance to the debtor, or other consideration for defendant's signing the note. The defendant's promise was therefore clearly *nudum pactum*; and as to the plaintiff's claim in respect to the \$200 note, the defendant is entitled to judgment.

Then as to the remaining question, which affects the plaintiff's claim in respect of the \$300 note, I am of opinion the plaintiff, by accepting interest from the other makers of the note up to the 14th October, 1882, precluded himself from enforcing, as against them, payment of the principal between the 8th August and 14th October; and

this was such a giving of time for valuable consideration as discharges the defendant as surety from liability on the note. The plaintiff was not called at the trial, and the parts of his examination put in at the trial confirm the endorsement. On page 5 he said, after looking at the endorsement on the note 'I think old Peter paid me interest on 8th August, 1882, up to 14th October, 1882. This is on the \$300 note.'

I am therefore of opinion the defendant is entitled to judgment in respect of this note also.

The judgment therefore found for the plaintiff must be set aside, and judgment entered for the defendant, dismissing the plaintiff's action with costs.

I have not considered the effect of the nonsuit in the Division Court. There is no doubt, before the passing of the Ontario Judicature Act, the nonsuit would not have been a bar to any further action. But since the Act there is a very grave question as to whether a nonsuit, without reserving to the plaintiff the right to bring a fresh action, must not be held to have the same effect as a nonsuit in the High Court of Justice. The defence of *res judicata* has not been raised by the pleadings, nor formally on the motion to set aside the judgment for the plaintiff, and though the question was incidentally presented on the argument, I do not think it necessary to express any opinion upon it.

The defence of insufficient stamps failed. The \$200 note had them on, and the \$300 note was not subject to dues, the Stamp Act having been repealed when the note was made.

I have not considered either the effect of the abandonment of the \$100 by endorsement on the \$300—whether such an endorsement may not amount in law to a legal exoneration of the maker's liability to that amount—as the view I have taken exempts defendant from liability altogether."

MACMAHON, J., concurred.

Motion allowed.

[CHANCERY DIVISION.]

RE TRAYNOR AND KEITH.

Will—Devise—Estate limited “to heirs but not assigns”—Fee simple—Vendor and Purchaser Act—R. S. O. ch. 109 (1877).

A devise in a will was as follows: “I also will, devise and bequeath to my daughter L. A. the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns.” L. A. married and had issue. In an application under the Vendor and Purchaser Act.
Held, that she took an estate in fee simple.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 109 (1877), upon a sale from Lydia Ann Traynor to Sylvester Keith.

The question arose on the construction of a clause in the will of John Gates, the father of the vendor, devising the property to her, and through which she sought to prove title in herself.

The clause was as follows: “I also will, devise, and bequeath to my daughter Lydia Ann the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns.”

The petition shewed the contract for sale, and alleged that the land referred to in the will was the land in question, and that she had married twice, and had children by both husbands living, and that she contended she took an estate in fee simple, while the purchaser declined to accept the land on the ground that she took only a life estate with remainder over to her heirs, or an estate tail.

The petition came on for argument on February 22, 1888, before Robertson, J.

E. H. Britton, for the vendee. The devisee only took an estate tail. The words used in the will shew an intention not to give an estate in fee simple, but a limited estate. The word “heirs,” in this will, mean “heirs of the

body." The words "and not to their assigns," must not be excluded. I refer to *Doe d. Ellis v. Ellis*, 9 East 382; *Greenwood v. Verdon*, 1 K. & J. 74; *Biss v. Smith*, 2 H. & N. 105; *Jenkins v. Hughes*, 8 H. L. Ca. 571.

D. A. Givins, for the vendor. The words "and not to their assigns" are repugnant to the rest of the devise, and are of no effect. Co Lit. 223a. *Re Casner*, 6 O. R. 282. They are a restraint upon alienation: *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156; but under the words in the will in that case which was a very similar case to this, it was held the devisee took an estate tail by implication and that the restriction was not an illegal one. See also *In re Rosher v. Rosher*, 26 Ch. D. 801; *Gullinger v. Farlinger*, 6 C. P. 512; *Re Watson & Wood*, 14 O. R. 48; *Dickson v. Dickson*, 6 O. R. 278; *Lario v. Walker*, 28 Gr. 216. A devise of lands to A and his heirs, with a gift over, if he die intestate or shall not part with the property in his lifetime, the gift over is repugnant and void, 2 *Jarman on Wills*, 4th ed. 15. *Leith's Williams on Real Property*, 101.

Britton, in reply. If the words, "and not to their heirs," could be altogether rejected the devise would pass an estate in fee simple, but they cannot be so excluded. The clause must be read as a whole, and the testator's intention given effect to. There is no authority for reading it as a devise to Lydia Ann and her heirs, and then construing what follows as a separate and repugnant clause.

February 24th, 1888. ROBERTSON, J.—The matter of this petition has been argued before me. I have considered it, and am of opinion that Lydia Ann Traynor took an estate in fee simple in the lands devised to her under the will of her late father John Gates, the testator above mentioned. As to the costs, for the reasons given by me in *Re Watson & Woods*, 14 O. R. 48, the purchaser should have the costs of these proceedings.

[CHANCERY DIVISION.]

RE COLLITON AND LANDERGAN.

. Will—Devise—Restraint on alienation—Estate tail.

A testator, by his will, provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my real estate * * * said estate being composed * *. I leave and bequeath the aforesaid estate to my son J. C., after my wife's death * * * and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs. Should my son J. C. die without heirs the estate * * * my daughters shall get their maintenance off said estate during * *. I also bequeath the sum of eighty dollars to each of my daughters * * * to be paid out of the said estate by my said son J. C." In an application under the Vendor and Purchaser Act, it was

Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject, however, to the charges of the several legacies to each of the testator's daughters.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112.

The petition shewed the contract for sale and purchase between John Colliton as vendor, and Matthew Breakenridge as purchaser, and an assignment of all his interest by Breakenridge to Nicholas Landergan, and that the principal question in dispute as to title was the construction of the will of John Colliton, Sr., the father of the vendor, and as to what estate the vendor took under the will.

The material parts of the will were in these words: "I leave and bequeath to my lawful wedded wife, Margaret Eagan, all my personal property as also the sole control and management of my real estate (during her widowhood or in other words while she remains my widow), said estate being composed, &c., * *. I leave and bequeath the aforesaid estate to my son, John Colliton, after my wife's death or on the day of her marriage, should she marry again, and the said estate is not to be sold or mortgaged by my son John Colliton, but is to belong to his heirs. Should my son John Colliton die without heirs then the estate is to be equally

divided between my daughters (then living) their heirs, executors, administrators, and assigns. And be it further understood that my daughters shall get their maintenance off said estate during their minority or until they get married. I also bequeath the sum of eighty dollars to each of my daughters at the time of their marriage, said marriage portions to be paid out of the said estate by my said son, John Colliton."

John Colliton was at the time of the making of the will and at the date of the testator's death, and for long after, a bachelor; and at the date of the agreement he had sisters living, who all had been married more than ten years. His mother had been dead over five years and he had married and had children now living.

The petition came on for argument on February 22nd, 1888, before Robertson, J.

W. H. Moore, for the vendor. The vendor being a bachelor at the date of the will and time of testator's death, if the word "heirs" is to be read "children" the rule in *Wild's* case applies, and it must be construed as a word of limitation and not of purchase and so confers an estate tail. The word "estate" used strengthens that contention: *Wood v. Baron*, 1 East 259; *Stobbart v. Guardhouse*, 7 O. R. 239; 2 *Jarman* on Wills, 4th ed. 328, 329, 370. The restraint on alienation is void: *In re Cleator*, 10 O. R. 326; *Dawkins v. Lord Penrhyn*, 6 Ch. D 318, per James L. J. at p. 326, and 4 App. Cas. 51; *Re Watson & Woods*, 14 O. R. 48; *In re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801. The words create an entail: *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156. The words "dying without heirs," where there is a devise on to a collateral relative, mean "heirs of the body" and creates an estate tail: *Tyrwhitt v. Dewson*, 28 Gr. 112; *Hawkins* on Wills 177; *Doe d. Anderson v. Fairfield*, 3 U. C. R. 140; *Dale v. McGuinn*, 15 Gr. 101; *Webb v. Hearing*, Cro. Jac. 415. The word "heirs" will not be construed

“children” except where a reference is made to the parent of the issue, as in *Smith v. Smith*, 8 O. R. 677; *Jordan v. Adams*, 9 C. B. N. S. 483, per Cockburn, C. J. An indefinite failure of issue was intended and therefore an estate tail is created, as 36 Vic., ch. 20, sec. 26 (O.), was not in force at the date of the will. The testator intended the fee to pass when he burdened the property with the daughters maintenance and legacies: *Doe d. Sams v. Garlick*, 14 M. & W., per Parke, B., at p. 707; *Lloyd v. Jackson*, L. R. 1 Q. B. 571; 2 *Jarman on Wills*, 4th ed. 268; *Pickwell v. Spencer*, L. R. 6 Ex. 190. The vendor should get his costs: *Re Watson and Woods*, 14 O. R. 48.

L. M. Hayes, for the purchaser. The vendor only took a life estate with remainder to his children as purchasers: *Jeffrey v. Scott*, 27 Gr. 314; *McPhail v. McIntosh*, 14 O. R. 312. The executory devise to the testator's daughters takes this matter out of the rule in *Wild's Case*: *Peterborough Real Estate Investment Co. v. Patterson*, 13 O. R., at p. 147. The restraint on alienation is reasonable and valid: *Smith v. Faught*, 45 U. C. R. 484. The purchaser should get his costs as he was obliged to come to the Court for an opinion and such course was justified by the circumstances: *Laird v. Patton*, 7 O. R. 137.

February 24th, 1888. ROBERTSON, J.—The above matter has been argued before me. I have considered it and am of opinion that John Colliton, the son, took an estate in fee tail in remainder after an implied life estate in his mother, subject, however, to the charges of the several legacies of \$80 to each of the testator's daughters on their marriage, and declare the same accordingly. The purchaser should pay the costs of the application and incident thereto.

G. A. B.

[CHANCERY DIVISION.]

WANTY V. ROBINS ET AL.'

Mechanic's Lien—Equitable interest in the land—Fraudulent scheme to evade lien—Notice—Registry Act—Innocent purchaser.

The law that a lien which arises by virtue of being employed and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance, must be restricted to an *innocent* purchaser who is entitled to the protection of the Registry Act, i. e., one who has not actual notice of the prior lien before he pays his money and registers his deed.

THIS was an appeal from a judgment of Robertson, J., in an action brought by William Wanty against Frederick Benton Robins and Annie Maria Wood, to enforce a mechanic's lien.

The action was tried at the Toronto Sittings on November 25th, 1887.

T. P. Galt, appeared for the plaintiff.

A. G. McLean and *R. L. Fraser*, for defendant Wood.

The evidence shewed that by an agreement dated July 7th, 1887, Frederick Atkin and Isaac Pappin the owners of the lands in question, agreed to sell the same to the defendant Robins, one of the terms of the agreement being that "the said purchaser agrees to start building upon the said lot at once." The plaintiff under an agreement with Robins performed certain contract work on the lands, to the extent of \$336.40 for which he was not paid, the last of said work being done on August 22nd. While the work was going on Robins entered into certain negotiations with one Charles Wood for the sale of the rear part of the property, which negotiations fell through, but a subsequent arrangement was arrived at by which Robins was to release to Atkin & Pappin the right to purchase which he had under his agreement with them, and they were to convey the whole

property to Wood, who was at the expiration of thirty days to reconvey the front part to Robins. The release to Atkins & Pappin was executed and they, on August 30th, conveyed the property to the defendant Wood, who was the wife of the said Charles Wood. It also appeared that both Mrs. Wood and her husband were aware that the plaintiff had performed the work on the property before the conveyance was made to Mrs. Wood. The plaintiff filed his lien September 15th.

At the trial the defendant Robins appeared in person and consented to judgment being entered against himself, which was ordered so to be entered and the action was tried as against the defendant Wood.

The learned Judge found that the deed from Atkin and Pappin to Mrs. Wood was a subterfuge to defraud the plaintiff out of his labour and materials, and that Mrs. Wood was a party to the scheme, and he gave judgment for the full amount of the lien.

From this judgment the defendant Wood appealed to the Divisional Court, and the appeal was argued on February 20th, 1888, before Boyd, C., and Ferguson J.

A. McLean and *R. L. Fraser*, for the appeal. The evidence shows that the plaintiff dealt with the defendant Robins alone, who at the best only had an equitable interest in the property. When Robins gave up the interest he had to Atkin and Pappin, they held the property subject only to the prior mortgages, and had a right to sell to whom they pleased, free from any lien, and Mrs. Wood purchased from them. The work was not done on her credit in any way. If the plaintiff had any lien against Robins, no such lien attached on the property in Mrs. Wood's hands. The plaintiff did not know anything about the title and he did not do the work on the credit of either Atkin, Pappin, or Mrs. Wood. [BOYD, C.—Is there anything to show that Mrs. Wood knew that the work had been done before she purchased?] There is nothing in

the pleadings, but the evidence shows she may have known the work was done, but not by whom or whether it was paid for or not. In any event the plaintiff's claim is strictly a statutory one, and must be covered by the Mechanic's Lien Act, and there is no provision in that for a case of notice. The date from which the lien attaches is the date of its registration, it does not relate back to the time of the doing of the work. Mrs Wood held under a deed which was registered prior to the registration of the lien and so cut it out; *McVean v. Tiffin*, 12 A. R. 1, at p.4; *Hynes v. Smith*, 27 Gr. 150, and *Reinhart v. Schutt*, not yet reported.* Mrs. Wood was not an owner as defined in subsec. 3 of sec. 2 of the Act, and the work was not done on her credit or with her privity or consent, or for her benefit; *Graham v. Williams* 8 O. R. at 480 and 9 O. R. 458.

T. P. Galt, contra. The question here is not one of mere ownership or registration, it turns on fraud, as the evidence disclosed a scheme between the defendant Mrs. Wood, her husband, and Atkin and Pappin to defraud the plaintiff out of his claim. In fact, the deed from Atkin and Pappin to Mrs. Wood was a mere subterfuge. The whole sale to her was put through in one day, and shows preconcerted arrangement. The trial Judge has found there was a scheme. *McVean v. Tiffin*, cited by learned friends indicates that a purchaser *without notice* has a good title, but that case deals with mortgages for future advances, and not with the case of an actual purchaser. *Graham v. Williams*, is not a parallel case to this, as the facts showed only an option to purchase which was never exercised. Mrs. Wood must claim under Robins, and she knew of the agreement to re-transfer and of the work having been done. As to notice I refer to *Rose v. Peterkin*, 13 S. C. R. 677.

McLean, in reply. No fraud can now be charged, as the pleadings have not been amended, and so no fraud is formulated, but even fraud would not avail the plaintiff. His right is a statutory one and must be strictly construed.

* Since reported ante p. 325.—REP.

March 1, 1888. BOYD, C.—In *Reinhart v. Schutt*, I had to consider to some extent the effect of the Registry Act upon the Mechanic's Lien Act, having regard to the decisions therein cited. It appears now to be the law, that the lien which arises by virtue of being employed and doing work on the land, is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance. This, however, in my opinion must be restricted to the case of an innocent purchaser who is entitled to the protection of the Registry Act. By that I mean one who has not actual notice of the prior lien before he pays his money and registers his deed. As was said in *Murphy v. Leader*, 4 Ir. L. R. 139, the Registry Act must receive an equitable construction, and the Court cannot permit it to be used as an instrument of fraud. The policy of such statutes was admirably defined in a very early case *Cheval v. Nichols*, Str. 664 in these words: "The statute only intended to give such notice of former incumbrance to purchasers, that they might not thereby be defrauded; but if a man knows of his own knowledge, that there is a prior incumbrance, and notwithstanding that knowledge will be a purchaser, the statute was never intended to relieve such, though the first incumbrance was not registered. For when a man purchases with notice of a prior incumbrance, he purchases with an ill conscience; and in a court of equity his purchase will never be established." These views are reiterated and emphasized in the latest case in our reports by Mr. Justice Strong in *Rose v. Peterkin*, 13 S. C. R. 677, 704, &c.

In the present case I accept the conclusions of the trial Judge, who found that the purchaser Mrs. Wood had actual notice of the facts constituting the plaintiff's right to a mechanics lien under the statute before she paid the price or registered the deed, and that her purchase was a scheme to evade or avoid the plaintiff's statutory charge upon the lands. It does not to me appear difficult to hold that Mrs. Wood is one who claims under Robins, who employed the plaintiff to do the work in question. Robins at that time

was vendee of the land, and the work done by the plaintiff would attach upon his equitable interest in the land. While yet entitled to specific performance of the contract to buy Robins relinquished his rights to his vendors, but that would not affect the lien of the mechanic, which had attached. The vendors getting a release of the right to purchase would, *quoad* this right, claim under their vendee Robbins. When these original vendors afterwards sold to Mrs. Woods, with notice of the lien of the plaintiff, she claimed under them, so that the chain of connection with and under the owner at whose instance the work is done is satisfactorily established.

It is to be noted as strengthening this position that it was a part of the contract between Robins and his vendors that he should proceed to erect houses on the land he purchased forthwith. I do not forget that there are expressions in *McVean v. Tiffan*, 13 A. R. 1 which appear to be inconsistent with what I have held as to notice of the lien affecting a registered purchaser, but I prefer not to take the responsibility of so deciding as to permit registration to postpone a prior lien of which the person who registers had actual notice.

The judgment of Robertson, J., should be affirmed with costs. The lien I understand attaches upon that estate or interest of the owner Robins which came to Mrs. Wood. It will therefore be a charge upon the land in subordination to the purchase money, which will rank prior to the mechanic's lien.

FERGUSON, J.—This action is for the purpose of enforcing a mechanic's lien, the plaintiff asking that the defendants may be ordered to pay him the amount of the lien \$336.40 and that in default of payment certain lands in the city of Toronto, or rather the equity of redemption therein, or a competent part of the same, be sold for the satisfying of his (the plaintiff's) claim.

Atkin and Pappin were the owners of the property subject to certain incumbrances. On the 7th July, 1887,

they entered into an agreement to sell to the defendant Robins, with whom the plaintiff made the contract to do the work, &c., in respect of which the lien is claimed. In this agreement with Atkin and Pappin, Robins became bound "to start building on the land at once." His agreement with the plaintiff was on the 23rd day of July, 1887. The plaintiff performed all the work, &c., before the transactions that will be presently mentioned respecting the land took place.

After the plaintiff had so done the work, &c., and on the 30th day of August, 1887 Robins, as it was said, relinquished all his right to the land under his agreement to Atkin and Pappin, who, on the same day executed a conveyance of the right in the land to the defendant, Mrs Wood. There had been some other transactions respecting this and other lands, in which Mrs. Wood's husband was concerned, which need only be referred to on account of its being said that they afforded evidence in support of some of the findings of the learned Judge who tried the action.

By the agreement with Atkin and Pappin, Robins plainly took an equitable interest in the lands, and I think what is called a relinquishment to them of this interest is really in equity a conveyance to them of the interest, which is the interest and the only interest in the lands that Robins had at the time he contracted with the plaintiff, and while the plaintiff was performing the work, &c. It is a very informal paper, but contains an agreement to release Atkin and Pappin from their agreement to sell to him. If this document did not operate as a conveyance in equity the interest remains in the defendant Robins. If it did so operate then I do not find any difficulty in arriving at the conclusion that the defendant Mrs. Wood claims through and under the defendant Robins. The trial Judge has found in effect that the conveyance from Atkin and Pappin to the defendant Mrs. Wood, was the outcome of a fraudulent scheme to defeat the plaintiff's claim, and that Mrs. Wood had actual notice and knowledge at the time that the work had been done by the plaintiff, and had not been paid for,

in fact of the plaintiff's claim, and I do not see any good reason for quarrelling with this finding.

At the time of the contract with the plaintiff, and whilst the work was being done by him, Robins was the "owner" and the rights of his co-defendant Mrs. Wood were acquired after the plaintiff had commenced his work, indeed after he had ceased to work. If there were nothing more I should be of the opinion that the judgment should be affirmed. See sub-sec. 3 of sec. 2, and sec. 6 of the Act, ch. 120 R. S. O. (1877.)

The conveyance to Mrs. Wood was registered on the 20th day of August, 1887. The plaintiff's lien was not registered till the 15th day of September, thereafter. The case was argued before us as if the registry laws had been pleaded which, however I do not find to be the case. Assuming, however, that any question arising under the Registry Acts is open for discussion, the decided cases on the subject seem now to show that it is too late to contend that the provisions of the Registry Acts do not apply to cases of unregistered mechanic's liens; and that a lien-holder if he wishes to preserve his lien as against subsequent purchasers and mortgagees, who register their conveyance, must avail himself of the advantages given by the Act by registering his lien. See *McVean v. Tiffin*, 13 A. R. 1 and the cases there referred to, as also *Reinhart v. Schutt*, since decided by the Chancellor, but not yet reported.*

A perusal of the case *Rose v. Peterkin*, 13 S.C. R. 677, leads to the conclusion that a subsequent purchaser or mortgagee, who registers his conveyance, does not gain this advantage if at the time of the payment of his purchase money and registering his conveyance he had actual notice and knowledge of the prior claim of the lien-holder, although there are some expressions in *McVean v. Tiffin*, which rather point in the other direction. This question has been somewhat fully discussed in the judgment of the Chancellor which I have had an opportunity of perusing, and I am disposed to agree in the conclusion at which he arrives.

*Since reported ante p. 325.—REP.

It is to be added that in the present case there is the finding of the fraudulent scheme to defeat the plaintiff's claim, the outcome of which was the plaintiff's conveyance as well as actual notice and knowledge by the defendant, Mrs. Wood, of the plaintiff's rights; and I agree that the judgment should be affirmed, and that the plaintiff's lien be satisfied from the source mentioned in the concluding part of the Chancellor's judgment.

G. A. B.

[CHANCERY DIVISION.]

WHALLS V. LEARN ET AL.

Infant—Married woman—Voidable conveyance—Relief—Ratification.

The effect of legislation now embodied in R. S. O. ch. 127, s. 3, has been to give to the conveyance of an infant *feme covert* the same characteristics as are by law attributed to the conveyances of male infants, i. e., if such deeds are of benefit to the infant or operate to pass an estate or interest they are voidable not void.

When a little more than two months after coming of age, a married woman sought to set aside conveyances for value made by her, while an infant *feme covert*, to the defendants, who were ignorant of her disability, and under which defendants had taken possession, it was

Held (reversing the judgment of Rose, J., at the trial), that she was entitled to such relief; but before the same could be granted, she must make complete restoration to the defendants of the specific or an equivalent value of that which she had received from them during her infancy. Mere quiescence for about two and a half months, after attaining majority was considered insufficient to operate as a ratification of the conveyances.

THIS was an appeal from the judgment of Rose, J., in an action brought by Nancy Jane Whalls against Charles V. Learn and Adam W. Graham to set aside a conveyance made by the plaintiff, a married woman, while under age.

The action was tried at St. Thomas on September 30th, 1887, before Rose, J., who subsequently delivered the following judgment, in which the facts are fully set out.

Ermatinger, Q. C., appeared for the plaintiff, and
J. M. Glenn for the defendants.

November 24, 1887. *ROSE*, J.—This is an action by Nancy Jane Whalls, wife of William Whalls, to have declared void a deed of 50 acres of land executed while she was an infant under the age of 21 years.

She was born on the 5th of October, 1865, and married to Wm. Whalls in January, 1880. The deed in question bears date March 11th, 1885.

On the 18th December, 1883, W. A. Davis, her father, granted to her the land in question, being the east half of the north half of lot 28 in the 4th concession of Malahide, for a nominal consideration of \$2. On the 9th of January, 1884, she borrowed from the defendant Graham, who, I find, was ignorant of the fact of her being under age, the sum of \$700, executing a mortgage on the land to secure the repayment.

With this money she, about the same date, purchased 10 acres of land, being part of lot 7 in the 8th concession of Yarmouth, subject to a mortgage.

About the 11th of March, 1885, the plaintiff made an exchange with the defendants, by which she conveyed to the defendants her equity in the 50 acres, in consideration of a conveyance to her of the equity of redemption in a certain parcel of land comprising about three acres owned by the defendant Learn, she being released by Graham from her covenants. The three acres were also a part of lot 7 in the 8th concession of Yarmouth, and adjoined the 10 acres, as I understand it. At this date, I find as a fact, the defendants were ignorant of the fact of her nonage.

At this date, therefore, the defendants had a deed absolute of the fifty acres, and the plaintiff was grantee of the equity of redemption in the ten acres and the three acres.

The mortgages on the ten acres and the three acres came into the hands of one George Scott, and the plaintiff and her husband borrowed a further sum from him, and for the purpose of consolidating their indebtedness, and to obtain a further advance, executed a new mortgage, and Scott executed discharges of the prior mortgages. Ascertaining, however, that the plaintiff was under age at the time she executed the new mortgage and obtained the discharges of the prior mortgages, he, Scott, took proceedings in the Chancery Division to have the discharges cancelled and the prior mortgages re-established.

To these proceedings the plaintiff and her husband were made party defendants, and the Official Guardian intervened and represented the infant, the present plaintiff.

On the 3rd of November, 1885, a decree was pronounced, in which was the recital, "as a proper compromise of this action as regards the infant defendant." By this decree the prior mortgages were declared valid and subsisting charges on the lands mentioned therein and the discharges cancelled. It also declared valid and subsisting a mortgage from the infant and her husband to the said Scott on the same lands, bearing date the 8th of April, 1885.

The mortgage indebtedness was ascertained at \$2,149.34, and a day fixed for payment, with a personal order against Wm. Whalls and an order for possession.

Subsequently, and about the 21st of April, 1886, with the approval of the Official Guardian, the infant and her husband being unable to redeem, the plaintiff Scott agreed to give her \$100 for a release of the equity of redemption, and an order dated the 3rd of May, 1886, was obtained from the Court, vesting the equity of redemption in the plaintiff Scott on the payment of \$100, which was paid.

The result was, that with the sanction of the Court she was permitted to sell the three acres or the equity of redemption in the three acres obtained from the defendant Learn, which was given to her in payment of the equity of redemption in the fifty acres.

The question arises, can she now obtain from the same Court a decree setting aside the deed she gave as consideration for the conveyance of the three acres?

I think this would not be in accordance with the principles laid down in *McDowgall v. Bell*, 10 Gr. 283, as to an infant being equally with an adult bound by proceedings in a suit instituted by the infant. Here, of course, the suit was not instituted by the infant, but the compromise was at her instance and for her benefit. Moreover, she is not in a position to restore the defendants to their original position.

Again, she became of age on the 5th October, 1886, and this suit was not instituted until the 18th of December, 1886, although she had full knowledge of her position and rights by reason of the litigation with Scott, and I entirely disbelieve her when she professes ignorance.

I am not prepared to say that such delay was not acquiescence within the rules laid down by the learned

Chancellor in *Foley v. Canada Permanent Loan and Savings Co.*, 4 O. R. 38.

It seems to me the result of the dealings between the plaintiff and defendants may be stated to have been an exchange of lands, the plaintiff exchanging her equity of redemption in the fifty acres for the equity of redemption in the three acres.

It is laid down in *Simpson's Law of Infants*, pp. 24, 25, that "If an infant exchange lands, and after full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompense), but voidable."

If the infant, instead of occupying the land, convey it to another so that upon attaining her majority she is unable to restore it to the person from whom she obtained it in exchange, is she in any better position when she comes to the Court seeking to have the exchange declared void? I think not.

The plaintiff and her husband seemed quite unable to realize that they were seeking anything dishonest or dishonorable in its character; but it seems to me it will be the plainest equity that her action be dismissed, with costs, which I order and direct to be done.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on February 18th, 1888, before Boyd, C., and Ferguson, J.

F. E. Hodgins for the appeal. The deed made by the plaintiff while under age cannot stand, and must be set aside. [FERGUSON, J.—Can the infant set aside her own grant, and still keep what she got as the consideration?] There is no authority that restitution must be made before the infant's deed can be set aside. [FERGUSON, J.—Perhaps not; but here it appears that the plaintiff cannot make restitution. Should the Court assist her?] The cases do not go the length of saying that the plaintiff must shew ability to make restitution before she can succeed. The question is one of pure law. Was the infant's deed void, and could it be ratified? The deed did not convey any estate, and did not operate at all, and so could not be

ratified. In *Foley v. The Canada Permanent Loan and Savings Co.*, 4 O. R. 38, it is true that it is decided that the deed of a male infant is voidable, not void; but here the infant is a married woman, and could not make a deed by virtue of R. S. O. (1877) ch. 27, sec. 3, until she was of the age of 21 years. The property was the wife's statutory separate estate, and could not be conveyed except in the mode provided by that statute. Even if it could be ratified, no act of hers until she became *sui juris*, i.e., *discover*t, could have ratified it. She was under coverture all the time, and is so still. The distinction between deeds of infants and married women is pointed out in *Zouch v. Parsons*, 3 Burr. at p. 1805. I refer also to *Simpson's Law of Infants*, 34; *Field v. Moore*, 7 D. M. & G. 691; *Buckmaster v. Buckmaster*, 35 Ch. D. 21; *Codrington v. Lindsay*, L. R. 8 Ch., at p. 589; *White v. Cox*, 2 Ch. D., in argument, at p. 392; *In re Vardon's Trusts*, 31 Ch. D. 275. The trial Judge was wrong in holding that two and a half months' delay was sufficient laches by plaintiff to bar her in seeking to enforce her rights. In *Holmes v. Blogg*, 8 Taunt. 35, the period was four months. There is a case of *Ashton v. McDougall*, 5 Beav. 56, where two months was held sufficient, but in that case the party was a widow, and so under no disability, and the two months was the period during which she was *discover*t, and not the period immediately following her attaining twenty-one years.

J. M. Glenn, contra. The defendants are innocent parties, and are so found by the Judge. The plaintiff knew her rights and her age, and two months is quite sufficient time within which she should have moved. In *Holmes v. Blogg*, 1 Moore, at p. 476, four months were held too long. The infant should not wait. The covenant in the deed was a representation as to age. See *Blake v. Bunbury*, 1 Ves. Jr. 514; *Gilchrist v. Ramsay*, 27 U. C. R. 500; *Goode v. Harrison*, 5 B. & Al. 147; *Miller v. Ostrander*, 12 Gr. 349; *Featherston v. McDonell*, 15 C. P. 162. R. S. O. (1877) ch. 127, sec. 3, does not apply to this case. That was made law in 1873, 36 Vic. ch. 18, (O.) The plaintiff was not married

until 1880, but by 35 Vic. ch. 16, (O.), the real estate of every married woman married after 1872 was made separate estate, and a wife could always convey that in a Court of Equity. The husband is not a necessary party: *Boustead v. Whitmore*, 22 Gr. 222. I also refer to *Wilson v. Birchall*, 16 Ch. D. 41.

Hodgins in reply cited *Sanders v. Malsburg*, 1 O. R. 178, and *The General Finance, &c., Co. v. Liberator, &c., Society Co.*, 10 Ch. D. 15.

March 1, 1888. BOYD, C.—A question of some nicety, not considered by the trial Judge, was argued before us as to the effect of the impeached conveyance which was executed by the plaintiff when under a double disability as an infant *feme covert*. The deed in question was executed on the 11th March, 1885, by the plaintiff and her husband, and was in form sufficient if the plaintiff had been then of age. She did not attain majority till the 5th October, 1886, and brought this action on the 18th December of that year, being two months and thirteen days after she was of full age.

The law then, and still in force, enables every married woman "being of the full age of twenty-one years," to convey by deed, &c.: R. S. O. ch. 127, sec. 3. It was argued that not having reached this age her deed was utterly void as at common law, and that no legislation had given capacity to convey to a married woman who was an infant.

Regarding the conclusion I have reached as to the judgment in this case, it is not needful to dwell upon this subtlety of void or voidable. My present impression is, however, that such a conveyance is one that would pass an interest, and is not to be regarded as void to all intents. One has to consider the leading principle which has guided Judges in modern days in their application of the rules of equity to the contracts of infants, and also to bear in mind the intention and effect of the legislation as to married women. It is to qualify them to deal with their property

as if they were unmarried, and to enable them to convey in the simple manner prescribed by the statute.

By the law the disability attaching to a *feme covert* who is an infant is not removed so far as the infancy is concerned. In that respect both sexes are alike incompetent. But apart from infancy, she may deal with her land as a *feme sole*. The effect of the legislation is, to give to the conveyances of married women (who are infants) the same characteristics as are by law attributed to the conveyances of male infants—that is, if such deeds are of benefit to the infant, or operate to pass an estate or interest, they are regarded as voidable only and not mere nullities. The nature of the transaction and the general convenience of mankind have largely influenced and controlled the course of decision as to the contracts and dealings of infants. What appears to me to be the result here as to the deeds of married female infants is judicially recognized as law in American cases: *Hughes v. Watson*, 10 Ohio 127; *Prewitt v. Graves*, 5 J. J. Marsh (Ken.) 114; *Sandford v. McLean*, 3 Paige (N. Y.) 117; *Bool v. Mix*, 17 Wend. 119.

But however this may be—whether the deed of March, 1885, was void or voidable—the defendants took possession of the land under it, and the plaintiff is coming here to get rid of it, and to have possession restored by the intervention of the Court. This she cannot succeed in without making complete restoration to the defendants of the specific, or an equivalent, value of that which she has received from the defendants during nonage. Coming to the Court as an adult she will be dealt with as any other litigant, and will be required to do equity as a condition of getting relief: *Everett v. Wilkins*, 29 L. T. N. S. 846.

I hesitate to find in this case that there is any evidence of acquiescence in or affirmation of the contract after the plaintiff came of age. She did nothing, she said nothing thereafter, and I doubt whether the short delay of two months and thirteen days should without more bar her.

What occurred during her minority as to the action respecting the three acres, when her interests therein were represented by the Official Guardian, should not affect her as to this action, unless it appeared that the dealing involved in this action was before the Court and the Official Guardian, and formed a part of the scheme of compromise approved of by the Court in May, 1886.

There is no defence made on the ground of changed circumstances on account of her delay, and nothing to indicate that a money compensation will not satisfy the claims of the defendants. These circumstances being considered, I think the judgment should be to allow the plaintiff to get back the possession of and property in the fifty acres on payment of the \$700 mortgage and interest, and the value of the three acres, which she received as the consideration for this conveyance. These values will be ascertained by the Master if the parties cannot agree, at the expense of the plaintiff, as in a redemption suit, and will form a charge on the land in the defendants' favour till paid.

Costs of the action should go to the defendants, except the costs before the Divisional Court, which should not be given to either side. If, however, the plaintiff does not comply with these terms, her action will be dismissed, with costs.

FERGUSON, J.—The plaintiff obtained the land in question from her father in the year 1883, when she was 18 years old. In January, 1884, she borrowed from the defendant Graham the sum of \$700, to secure which she and her husband executed a mortgage upon the same lands. This sum she expended in the purchase of ten acres of other land, which was subject to a mortgage in favour of one Scott. In March, 1885, the plaintiff conveyed the equity of redemption in the first mentioned lands to the defendants, the consideration for such conveyance being the conveyance to her of three acres of land adjoining the aforesaid ten acres, and a discharge of the mortgage for the

\$700, or, as it is stated, a release of her and her husband from all liability on that mortgage. The three acres were also subject to a mortgage to Scott, so that the whole thirteen acres were subject to mortgage to Scott, who brought an action thereon, in which judgment was pronounced in May, 1886. The plaintiff was unable to pay the mortgage money so as to redeem the lands. Scott, however, made an offer of \$100 for her interest, which was accepted with the sanction of the Court, but the questions or matters now the subject of litigation were not then in any way before or known to the Court. This was in the year 1886.

On the 5th of October, 1886, the plaintiff attained the age of twenty-one, and in less than two and a half months thereafter she brought this action, the writ having been issued on the 18th December, 1886. She claims possession of the lands she conveyed to the defendants, and what she calls "mesne profits," and she asks general relief. She thus says to the defendants: "Although you gave me as the consideration for this land the sum of \$700 in cash and conveyed to me the equity of redemption in other lands, I now require from you the lands that I conveyed to you, with all the profits that you have since derived from them."

At the time of the conveyance in question the plaintiff was, it is true, under a double disability, that is, the two disabilities of infancy and coverture. The learned Judge expressed the opinion that the result of these dealings might be fairly stated as an exchange of lands, and that there had been a ratification of it by the plaintiff and her husband, referring to the rule found in *Simpson's Law of Infants*, pp. 24, 25.

Even if the only disability were the infancy, I should hesitate before arriving at the conclusion that inaction for the short period of two months and thirteen days, under the circumstances that appear in this case, operated as a ratification of the deed.

When an infant makes a contract and after he attains full age seeks to avoid it, many, I think all the authorities

shew that he must restore the consideration that he received.

This proposition was not disputed upon the argument, but it was contended that the conveyance by the infant *feme covert* was wholly void, and not voidable only, and was therefore incapable of ratification, and not subject to the same rule as the contract of an infant.

In the case *Doran v. Reid*, 13 C. P. 393, it was held that a conveyance of the wife's land executed by her and her husband according to all the formalities then required, she being at the time of its execution under age, did not pass her estate in the land though it did pass the estate of her husband. That, however, was an action of ejectment, and was determined according to the strict rules of law, the holding being simply that the estate did not pass by the deed. There are, perhaps, other cases of the same kind. *Doran v. Reid* was decided in 1863.

There have been many changes since in the law respecting the rights of property of married women. This property was acquired by the plaintiff after the passing of the Married Woman's Property Act of 1872, and I cannot but think that there is much force in the reasoning contained in the Chancellor's judgment tending to shew that the disability of importance to be considered in the present case is that of infancy; but, however the proper conclusion in that respect may be, the case is, I think, to be looked at in this way. The plaintiff comes to the Court for relief. She asks to be awarded the fifty acres of land that she conveyed away, and at the same time to keep the consideration that she got from the defendants for it, which was a large and valuable consideration. The defendants set up the facts. Defences resting upon equitable doctrines are now available in actions for the recovery of land. So far as the disability by reason of infancy is concerned there is no doubt that the plaintiff must restore the consideration she got from the defendants, or its equivalent, when she avoids her conveyance.

And as to the other disability—the coverture—I think it would be wholly inequitable and unjust to grant the relief she asks unless she restores the money and property she got from the defendants, or its equivalent. Even if it were conceded that by reason of this disability nothing passed by the conveyance in question, this contention and litigation being between the parties to the original transaction, I think the Court should not grant any relief to the plaintiff unless she submits to do what is just and equitable.

There are some passages in the judgment of the Lord Chancellor in the case *Codrington v. Lindsay*, L. R. 8 Ch. 578, which appear to have a bearing upon this subject. In that case the deed of settlement was made while the plaintiff was under the disability of coverture. It was held that the deed was not binding upon her or her estate sought to be dealt with by it. After the removal of the disability she filed her bill to have it declared that she was not put to her election under the settlement, and to have a certain fund transferred to her. The decision, reversing the judgment of the Master of the Rolls, was that she was put to her election between the interests provided for her by the settlement and her right to receive the fund free from the settlement; and it was further held that in the event of her electing to take against the settlement she was bound to account for all benefit received under it after the date of the order *nisi* for the dissolution of the marriage, and that the parties disappointed by the election had a lien upon the fund for what she had so received.

I agree in the disposition of the case made by the judgment of the Chancellor.

G. A. B.

[CHANCERY DIVISION.]

BOYD V. SULLIVAN.

Contract—Goods deliverable by instalments—Payment when no time fixed—Refusal to pay for part delivered—Refusal to deliver remainder.

Plaintiff and defendant entered into the following contract : " To G. M. B. (plaintiff)—Please deliver me at Port Arthur five head good steers on first *City* up, and six steers and heifers on second trip *City* up, and four cows on same trip, also 100 good lambs in lots of fifteen or twenty, of \$3; each lamb to dress not less than ten pounds per quarter, price of cattle \$3.50 weighed at Port Arthur." Nothing was said as to time of payment. The cattle were all delivered, but the plaintiff refused to complete the contract until the cattle were paid for, which the defendant declined to do.

Held (reversing ARMOUR, J.), that the price was not payable till the completion of the whole contract, and that the refusal of the defendant to pay for the part delivered did not justify the plaintiff in refusing to deliver the remainder.

Per FERGUSON, J., The contract being entire and containing no stipulation regarding the manner or time of payment, the defendant was entitled to refuse to pay for the part that had been delivered until the remainder should be delivered, and the refusal of the plaintiff to deliver the remainder was not justified and was a breach of the contract.

Per BOYD, C., If the contract is entire the price was not payable until all the deliveries were completed ; if it is divisible *quoad* the cattle and the lambs, so as to be in effect two contracts, the failure to pay for the cattle by the one party would not excuse the other in not forwarding the lambs within the time limited. Where there has been partial delivery, and consumption of that part, and failure to perform the rest of the contract, the seller has the right to sue as upon a *quantum meruit*, and the purchaser has his cross action or counter-claim for damages.

Withers v. Reynolds, 2 B. & Ad. 882, considered and distinguished.

THIS was an appeal from the judgment of Armour, J., in an action brought by George M. Boyd, against Michael Sullivan.

The action was tried at Port Arthur, on July 11th, 1887.

G. T. Ware, for the plaintiff.

A. R. Lewis, for the defendant.

The evidence shewed that the plaintiff sought to recover \$610.05 as the price or value of part of the animals delivered under the contract which is set out in full in the judgments of Armour, J., and Boyd, C., alleging that each

delivery should be paid for when delivered, while the defendant alleged that no payment was due until the whole contract had been fulfilled.

The defendant also filed a counter-claim for damages sustained by him in procuring the balance of the contract not delivered by the plaintiff, and he paid \$290 into Court in full of plaintiff's claim.

August 11th, 1887. ARMOUR, J.—I find the plaintiff and defendant on the 18th day of September, 1886, entered into the following contract, signed by them respectively :

“ To G. M. Boyd, Owen Sound. Please deliver me at Port Arthur, five head good steers on first *City* up,* and six steers and heifers on second *City* up, and four cows on same trip; also 100 good lambs in lots of fifteen or twenty of \$3, each lamb to dress not less than ten pounds per quarter, price of cattle \$3.50, weighed at Port Arthur.”

I find that at the time of entering into the said contract and in the negotiating thereof, nothing was said by either party as to the time of payment.

I find and hold that by the terms of the said contract, the price was payable upon each delivery.

I find that the plaintiff delivered to the defendant and the defendant received and accepted from the plaintiff the five head of good steers on first *City* up on the 25th day of September, 1886; and the six steers and heifers on second trip *City* up; and four cows on same trip; also three sheep not in the contract, at \$4.50 each, and six of the lambs mentioned in the contract on the 11th day of October, 1886.

That the goods so delivered amounted in price to the sum of \$610.05; that the defendant paid the freight and wharfage thereon, amounting to the sum of \$117.78, leaving a balance due to the plaintiff on the last mentioned day of \$492.27.

I find that the defendant refused to pay this sum or any part thereof to the plaintiff until the plaintiff should deliver all the residue of the lambs mentioned in the agreement set forth.

I find and hold that this refusal on the defendant's part justified the plaintiff in not delivering the residue of the said lambs.

*First trip up to Port Arthur of boat *City of Owen Sound*.—REP.

I therefore direct that judgment be entered in this cause on and after the 5th day of next Michaelmas Sittings, for the plaintiff for the amount ascertained as follows: Taking the said sum of \$492.27, with interest from the 11th day of October, 1886, to the 27th day of December, 1886, and then deducting the sum of \$290 paid into Court from the said sum of \$492.27 with interest to that date—with interest on the balance so found to the date of the entering judgment, such balance of such interest to be the amount for which the said judgment shall be so entered together with the full costs of suit; and that judgment be at the same time entered, dismissing the counter-claim with costs. See *Withers v. Reynolds*, 2 B. & Ad. 882; *Freeth v. Burr*, L. R. 9 C. P. 208; *Mersey Steel and Iron Co. v. Naylor*, 9 App. Cas. 434.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on February 24th, 1888, before a Chancery Divisional Court, composed of Boyd, C., and Ferguson and Robertson, JJ.*

Aylesworth, for the appeal. The defendant's counter-claim should have been allowed. The question is, Was the plaintiff entitled to refuse to deliver the balance of the contract until he was paid for what he had delivered. The contract was an entire contract, and the necessary legal implication is, that payment was not to be made till delivery was completed. Two of the cases referred to by the trial Judge, *Freeth v. Burr*, *supra*, and *Mersey Steel and Iron Co. v. Naylor*, are in the defendant's favour. In the first, the time of payment was made distinct. Refusal to pay does not give the plaintiff the right to refuse to deliver. See also *Withers v. Reynolds*, 2 B. & Ad. 882; *Martindale v. Smith*, 1 Q. B. 389; *Ex p. Chalmers*, L. R. 8 Ch. 289. Defendant has paid \$290 into Court, so if the counter-claim is allowed, there should be a verdict for defendant on the whole record.

D. Morrison, contra. The plaintiff was entitled to payment for the two lots delivered, and on refusal was entitled to decline to deliver any more. When the defendant took a position inconsistent with the terms of the contract, the plaintiff was entitled to refuse to deliver; *Withers v. Reynolds*, 2 B. & Ad. 882. In *Freeth v. Burr*, L. R. 9 C. P. 208, there was no repudiation of the contract; it was

*For the reason that the judgment of Armour, J., was in appeal, and Falconbridge, J., was concerned in the suit while at the bar.—REP.

virtually admitted, although a claim for damages was made. In *Mersey Steel and Iron Co. v. Naylor, supra*, the position taken was not inconsistent with the contract. This contract was divisible into two parts, one as to the cattle, and the other as to the lambs, and when the cattle were delivered they should have been paid for. See the judgment of Osler, J., in *Midland R. W. Co. v. Ontario Rolling Mills Co.*, 2 O. R. 1, at p. 2, and in appeal, 10 A. R. 677.

Aylesworth, in reply. Payment for each instalment or delivery, was a condition precedent.

March 1, 1888. FERGUSON, J.—The contract on which the action is brought, which the learned Judge has found was entered into by the parties, and which he has set forth in his judgment, appears to me to be an entire contract. The plaintiff is a cattle dealer, residing at Owen Sound, and the defendant a butcher residing and carrying on his business at Port Arthur. The object of the defendant was, I think, to obtain through this contract, at the then advanced season, a certain stock of animals for the purposes of his business during the winter season, or at all events, part of that season then approaching; and it seems impossible to think that the plaintiff did not know this, if I am right in thinking that such was the fact. The contract specifies the animals that were the subject of it, and the price to be paid for them, as well as in a measure, the times and mode of delivery; but it is silent as to the time and manner of payment.

Whatever might be inferred from the meagre evidence of former dealings between the parties, or in regard to the manner of payment generally in transactions of a like kind at the place where the goods were to be delivered, or from the conversation between the parties respecting credit in the transaction in question, (if any thing could be so inferred) I think there is no ground for the inference that the defendant was to pay for each shipment of the goods as it was delivered, or even that the cattle, as contradistinguished from the lambs, should be paid for when they

had all been delivered, and before the delivery of the lambs.

In this view of the meaning of the contract, the case differs in a very material point from the case of *Withers v. Reynolds*, 2 B. & Ad. 882, so much referred to and relied upon in the arguments of counsel, for in that case the contract was, according to the construction placed upon it by the Court, an agreement whereby the purchaser had agreed to pay on delivery for each load of straw delivered to him by the seller; and this element of the contract afforded the turning point of the decision, the Court being of the opinion that the purchaser by refusing to pay for each load of the straw as delivered, and insisting upon having in his hands continually during the currency of the contract, one load of the straw not paid for, refused to perform the contract that he had made and abandoned it.

The rule stated by Lord Justice Coleridge in the case of *Freeth v. Burr*, L. R. 9 C. P. 208, and approved of by the Court of Appeal in England, in the case of *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, and afterwards in the House of Lords in the same case, 9 App. Cas. 434, and referred to in the Ontario Court of Appeal, in *Midland R. W. Co. v. Ontario Rolling Mills*, 10 A. R. 677, is as follows: "In cases of this sort, where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract."

The conduct of the defendant in the present case, which is relied upon by the plaintiff as a justification for the plaintiff's refusal to deliver the remainder of the property mentioned in the agreement, the ninety-four lambs, is the defendant's refusal to accept the plaintiff's draft for the price, or to pay for the part of the property that had been delivered until the remainder of it should be delivered, still affirming the agreement and expressing his desire that the remainder of the property contracted for should be

delivered to him. Assuming that the view I have taken as to the meaning of the agreement is the correct one, the defendant had, I think, the right to take this position and to do as he did; the contract being entire and containing no stipulation regarding the manner or time or times of payment. I cannot see that this conduct of the defendant can be considered as having amounted to an intimation of an intention on his part to abandon and altogether refuse performance of his agreement.

It may be that the plaintiff entertained fears that if he delivered the remainder of the property pursuant to the contract, he might have trouble about getting the price from the defendant; but this does not appear: nor does it appear that the defendant was not in perfectly good and solvent circumstances. It does appear that the market as to cattle was a falling market, and that all the cattle contracted for were delivered; and that the market as to lambs was a rising market, and that only six lambs out of the one hundred contracted for were delivered; and it further appears that before the plaintiff could, in the ordinary course, have been aware of the defendant's refusal to accept his draft, and the reasons given for such refusal, he (the plaintiff) made sale at an advanced price of certain lambs at Little Current, which there is some evidence indicating were lambs intended to answer, or answer in part his contract with the defendant.

I am of the opinion that it has not been shown that the plaintiff was set free from the performance of the contract on his part by any conduct of the defendant; and that the refusal of the plaintiff to deliver the ninety-four lambs under the agreement, was not justified, and was a breach of the contract by the plaintiff. This breach, however, did not reach to the whole consideration, and was one that could be satisfied by damages, hence the defendant was liable to pay for the part of the consideration that he had received, and the plaintiff became liable to answer in damages to the defendant for the breach. See 1 *Wms. Saunder's Notes to Pordage v. Cole*, 552, 555, ed. of 1871.

If, as contended for by plaintiff's counsel in one part of his argument, the contract is divisible into two parts or two contracts, one for the purchase and sale of the cattle, and the other for the purchase and sale of the lambs, the result would be practically the same, for the defendant would be liable to pay for the goods delivered under one contract, and the plaintiff liable for his breach of the other. The plaintiff has recovered for the price of the goods delivered by him, which, after certain deductions as to which there is no dispute, amounts to \$492.27, the defendant having paid into Court the sum of \$290. This payment into Court was at an early period in the proceedings—(it was said with the appearance to the action.) The defendant counter-claimed for damages by reason of the breach by the plaintiff of the agreement. Upon this counter-claim, the parties are, as I understand, virtually in the same position as if the defendant had under the former practice brought a separate action. The defendant would, in such an action, be entitled to recover against the plaintiff the damages arising by reason of the plaintiff's breach before referred to, and the measure of the damages would, in such case be, according to the well known rule, the difference between the contract price of the ninety-four lambs that were not delivered, and the price for which the same number of such lambs could be obtained or "laid down" at the place of delivery (Port Arthur) at the time they should have been delivered by the plaintiff.

It is undisputed that the lambs could not have been procured or purchased by the defendant at or near Port Arthur. It appears that they could not have been procured at Owen Sound at the time the defendant despaired of getting them under the agreement, except in very small lots. It does not appear that they could have been got at Collingwood, but both these places are spoken of in the evidence as places of sale and shipment to Port Arthur of chattels of this kind.

The date of the contract is the 18th September, 1886. The one hundred lambs were by its terms to be delivered

at Port Arthur in lots of fifteen or twenty. From this, one understands that the delivery of the lambs would extend over a considerable period of time. It is, I think, undisputed that they were to be delivered before the close of navigation, in the fall of that year. Whether disputed or not, such, I think, is the conclusion in this respect that should be drawn from reading the agreement in the light of surrounding facts.

On the 3rd of November, the defendant having despaired of getting the lambs from the plaintiff, came to Owen Sound and thence to Toronto. He says his sole object or motive in so doing was to procure lambs in place of those he had purchased from the plaintiff; but that on the way opportunity served, and he bought three or four horses. On his way he met the plaintiff at the Sault. They had a conversation on the subject of their differences, but they do not agree as to what passed.

Reading what each says as to this, I think it appears that the defendant spoke to the plaintiff about the lambs, desiring that they should be delivered to him, and adding that he was going to purchase other lambs, and if they cost him more than the contract price, he would charge the plaintiff with the difference; and that the real point of difference between them was the same as before: that the plaintiff would not deliver the lambs till he was paid for the property that had been delivered, and this the defendant would not do till he got the lambs. The plaintiff says he had the lambs then. The defendant says he asked the plaintiff if he had them, and that the plaintiff said he had not. The defendant says that when he told the plaintiff he would charge him with the difference as above, (if any) the plaintiff replied that he "had thrown up that arrangement, and he knew how it was," and that he (the defendant) said "yes, I know."

The defendant made some inquiry at Owen Sound, and says he could not get the lambs there unless in small lots, to be gathered together, and he came on to Toronto and purchased a lot of 119 at \$3.60, which he had sent by what is called the last trip or last boat to Port Arthur.

By the counter-claim he seeks to recover from the plaintiff the advance in price over the contract price, the freight and wharfage, a number of items of incidental expenses for feed of the lambs, &c., and it appears that he had a man to do some work driving the lambs, &c., for which no charge appears. The advance in price on the ninety-four lambs amounted to \$56.40, the freight \$94.00, the wharfage \$4.80, and the other smaller sums for feed, &c., amount to \$18.26. He also charges \$40.00 for his own expenses, (fare) by boat and rail, \$18.00 for hotel bills, and \$24.00 for twenty-four days time; and in this way a sum is made up, which taken together with the \$290 paid into Court, would overpay the plaintiff by the sum of \$48.39; but he was and is willing to forego this balance, saying simply that the sum paid into Court is enough to satisfy the plaintiff's claim.

It was contended that the defendant should not have come to Toronto at all, and that his expenses in so doing should not be in any case allowed him, as he could have done the business by letter, &c. It is, however, to be borne in mind, I think, that it had become very late in the season, and I think not through the fault of the defendant, that he was in great need of the lambs as shown, not only by his saying so, but by the fact of his having borrowed some twenty or thirty lambs from his neighbours in the same business; and that it was of very great importance to him that he should be certain of getting the lambs, and that if he left at that season of the year, the purchase and shipment and care of the lambs on the journey to others, many things unfavourable to him might have happened that were or would be avoided by his being present himself. I cannot say that, under all the circumstances that appear, I am of the opinion that the defendant acted wrongly in coming to Toronto to make the purchase and attend to the matter himself. Besides the \$48.39, the balance mentioned above, would pay his charges for his time and his hotel bills, and leave some \$6.00 to apply upon his "boat and rail" fare.

I have from the evidence made a rough comparison of the figures taken in this way, and what they would be if it were assumed that the lambs could have been got at Collingwood at the same price as that paid by the defendant, and that the transaction could be safely made by letter, the lambs in such case going to Port Arthur by the last boat. The difference in price would be as before \$56.40, the freight \$1.12½ each, \$105.75; feed on board \$9.40, and taking the figures in this way without any charges for agency or commission, or incidentals such as feed before shipment, &c., the sum paid into Court, would fall only \$30.72 short of being sufficient to satisfy the plaintiff's claim. But it is not shown that the lambs could have been so procured at Collingwood, and looking at the matter of these damages as best I can in the light of the evidence, I am disposed to think that the defendant made a not unreasonable calculation and estimate when he paid the \$290 into Court, saying that it was sufficient to satisfy the demands of the plaintiff. I think that on such evidence a jury might reasonably arrive at this conclusion. I think the defendant entitled to recover on his counter-claim to the extent claimed by his counsel, that is to say, the whole amount of the detailed figures given by him except the \$48.39, which he abandoned on paying the \$290 into Court.

The matter of costs will be properly disposed of, I think, by considering the case as two actions. The \$290 was not sufficient to satisfy the plaintiff's claim regardless of the counter-claim, and the plaintiff succeeds in recovering a sum over the amount paid in. But the defendant on his counter-claim recovers a like sum as damages, so that the plaintiff having got the \$290, although each party succeeds, neither is now entitled to receive any sum from the other apart from the matter of costs. There should be judgment for the plaintiff in the action with costs, and judgment for the defendant on his counter-claim with costs: *Shrapnel v. Laing*, 36 W. R. 297.

If, however, the plaintiff thinks he can give more, or better evidence in opposition to the defendant's counter-claim, he may have a new trial on payment of the defendant's costs if he elect to take it, if not, the judgment as above. The election to be made in a fortnight.

BOYD, C.—*Withers v. Reynolds*, 2 B. & Ad. 882, is a decision, the effect of which is thus put by Coleridge, J. in *Franklin v. Miller*, 4 A. & E. 606: "In *Withers v. Reynolds*," he says, "Each load of straw was to be paid for on delivery." [That is to say, that was the Court's interpretation of the agreement according to the terms actually employed therein.] "When the plaintiff said that he would not pay for the loads on delivery, that was a total failure, and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract."

There is, it appears to me, a very important distinction between the facts in this case and those in *Withers v. Reynolds*. The written contract here is in these words:

"To G. M. Boyd, Owen Sound.—Please deliver me at Port Arthur, five head good steers on first *City* up, and six steers and heifers on second trip *City* up, and four cows on same trip; also 100 good lambs in lots of fifteen or twenty of \$3, each lamb to dress not less than ten pounds per quarter, price of cattle \$3.50, weighed at Port Arthur."

The defendant, a butcher at Port Arthur, was buying his supply of fall meat from the plaintiff, a cattle dealer at Owen Sound, and contracted for a specific quantity to be delivered that fall before the close of navigation.

As I read it, the paper evidences *one contract, single and entire*, for the sale and purchase of cattle and lambs, (15 head of cattle and 100 lambs) at a fixed price, but nothing is expressed as to the time of payment.

This last point as to payment is that upon which the decision must rest, and it is one upon which (unlike *Withers v. Reynolds*) the agreement is silent. The trial Judge has found that by the terms of the contract the

price was payable upon each delivery. This term is not expressed in the contract; it may be said to be the implied term, or it may be said to be the proper effect of the contract, but it cannot be evolved from any words used. This being so, the questions arise: When the contract fails to fix a time for payment in the case of one purchase of goods or chattels made deliverable in parcels or by instalments, does the law imply that payment shall be made on each delivery? If there is a failure or refusal to pay for each parcel on its delivery, does that give the seller an option to rescind?

Withers v. Reynolds affords no affirmative answer to these questions, for there the contract itself fixed the date of payment. Here the dealings of the parties negatives such a mode of payment as the Judge has found—for two deliveries of the stock were completed before there was any demand of the proportionate price. Any talk between the parties about payment, would indicate that thirty days credit would be given, but it is not pretended that there was any conclusion reached as to payment, so that the case is to be viewed as one resting on the writing and its legal effect upon the time of payment.

Anson refers to *Withers v. Reynolds* as deciding that if default in one item of a continuous contract to be fulfilled by instalments be accompanied with an announcement of intention not to perform the contract upon the agreed terms, the other party may treat the contract as being at an end: *Anson on Contracts*, 4th ed., p. 292.

The contract in *Withers v. Reynolds*, was for no specific quantity of straw, but for a periodical delivery of so many loads during a given period at a fixed price per load, to be paid on each delivery. The contract was in truth several as to each load. The facts shewed that there was not only a failure to pay for each, according to contract, but in effect a refusal beforehand to pay as agreed upon for subsequent deliveries, which operated as a repudiation of the whole contract.

Here the evidence falls far short of any such repudiation on the part of the defendant. He was anxious to get the lambs and offered on the 15th November to pay for them on delivery. This is, indeed, all he was bound to do in strict law, whether this contract is regarded as indivisible or (as the matter was argued before us) as divisible *quoad* the cattle and the lambs. If the contract is entire, the price was not payable till all the deliveries were completed; if it is divisible so as to be in effect two contracts, then the failure to pay for the cattle by the one party would not excuse the other in not forwarding the lambs within the time limited.

In *Oxendale v. Wetherell*, 9 B. & C. 387, Parke, J., said, "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered."

This language applicable to such cases where the contract is silent as to payment on the delivery of each parcel, is adopted as correct by the Privy Council in *Colonial Insurance Company of New Zealand v. Adelaide Marine Ins. Co.*, 12 App. Cas. 138. It follows that where there has been partial delivery and consumption of that part, and failure to perform the rest of the contract, the seller would have the right to sue as upon *quantum meruit*, and the purchaser would have his cross-action or counter-claim for damages. Such as it appears to me is the precise position of affairs in the case in hand: *Shipton v. Casson*, 5 B. & C. 313, Bayley, J.

Besides the English cases which were cited on the argument, the following in the States, are worth consulting: *Tipton v. Feitner*, 20 N. Y. 423; *Shinn v. Bodine*, 60 Pa.

St. 182. This last case is approved of as sound law by the Supreme Court of the United States in *Norrington v. Wright*, 115 U. S. Rep. at p. 212.

I have not thought it needful to discuss whether this contract may be open to a third mode of treatment suggested by the language of Best, C. J., in *Mavor v. Pyne*, 2 C. & P. 91. That is to regard it as consisting of one entire contract as to the whole, with subordinate contracts as to each shipment. As to these subordinate contracts, even if it were implied by law that payment should accompany the delivery ; yet the omission or refusal to pay would not in the circumstances of this case (which my brother Ferguson more fully details) operate as a repudiation of the whole. See *Champion v. Short*, 1 Camp. 53, and cases in note.

It is said in *Anson*, that the law as to instalment contracts is yet unsettled ; but however this one be viewed, whether as entire and indivisible, or as separable into two parts, according to the argument before us, or as consisting of one principal entire contract with subordinate separable terms as to each delivery, yet the result is the same so far as the defendant ought to recover damages is concerned.

My brother Ferguson has gone into the figures as to what damages should be awarded to the defendant. I agree in the general result, that there should be a verdict for the plaintiff on his claim with costs, and a verdict for the defendant on his counter-claim for an amount equal to the plaintiff's verdict, with costs of the counter-claim, which may be larger, as there was no contest about the right of the plaintiff to recover, subject to the counter-claim as a set-off. As to the proper mode of awarding and taxing costs in these cases, see *Shrapnel v. Laing*, 36 W. R. 297.

If the plaintiff is dissatisfied as to the amount of damages he may have a new trial on payment of costs.

ROBERTSON, J., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

GREEN v. THE CORPORATION OF THE TOWNSHIP OF ORFORD.

*Municipal corporations—Drainage—Work done in excess of contract—
Necessary work—Liability of corporation.*

A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor, under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points, where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles, so far as laid, to be taken up and relaid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by the contract.

By amendments to the Municipal Acts, councils, in the case of drainage works, are authorized to make an assessment upon the property of those benefited when the means provided are not sufficient; and any damages recovered in proceedings respecting such works are to be charged against the lands benefited.

It was proved that the work done was absolutely necessary, for without it the drain would have been useless. No formal resolution of the council was passed authorizing this work to be done, nor was there any contract therefor under the corporate seal. In an action against defendants to recover the value of such work,

Held, that the defendants were liable therefor.

THIS action was brought by the plaintiff, a contractor, against the corporation of the township of Oxford, to recover the value of certain work done by him in excess of what was required to be done under the terms of the contract, which had been executed by the defendants under their corporate seal.

The action was tried before Galt, J., without a jury, at Chatham, at the Spring Assizes of 1887,

The learned Judge reserved his decision, and afterwards delivered the following judgment:

September, 9th, 1887. GALT, J.—This action is brought to recover for certain extra work done on a drain called the "Stover Drain."

There was a contract, dated the 24th June, 1885, entered into between the parties, the only portion of which neces-

sary to be referred to, is briefly as follows : the plaintiff, for the consideration mentioned, contracts with the defendants "to make, or cause to be made, 644 rods or five sections, comprising the whole of the Stover drain, except from stake 26 to stake 50 drain in the said townships of Howard and Oxford, according to the plans and specifications of the said drain on file with the township clerk, adopted by the said council, and which are hereby declared to be a part of this contract, being of the following dimensions at the respective stations hereinafter named, the distance stations is comprised in this contract."

Here follows a statement of the stations, depth, top, and bottom ; the only portion of which bearing on the present case is that relating to the third section between stations 7 to 14; and my judgment is confined exclusively to those portions of the plaintiff's claim as, in my opinion, the plaintiff has no claim on any other ground against the defendants. The contract then specifically sets out the depths of the excavation required, as follows :

Boundary of Pipe—Station.	Depth.	Top.	Bottom
7	11.06	26	4
8	12.69	"	"
9	12.31	"	"
10	13.92	"	"
11	10.90	"	"
12	10.06	"	"
13	9.78	"	"
14	3	"	"

There is a special memorandum as follows: "From 7 to 14 depth of profile."

The above are the depths shown on the profile.

It will therefore be seen that the contract, so far as the drain between stations 7 to 14 are concerned, is express.

After the plaintiff had proceeded some distance between these stations, it was found that the depths were incorrectly given, and that, unless a change were made, the drain would be useless. The engineer in charge then directed the change to be made, whereby, as the plaintiff alleges, he has been put to a very considerable expense. It was not considered expedient at the trial to enter into the details of this extra, therefore no specific evidence was given, as I intimated to the learned counsel, that if, in my opinion, the plaintiff was entitled to recover, I should direct a reference to the Master to ascertain the amount.

It was proved that the plaintiff notified the members of the council to come and inspect the drain; and that several of them did so. The plaintiff stated that the members of the council promised to pay him for any extra expense incurred. This was denied by them; but it is a matter of no consequence so far as the corporation is concerned, as it was shewn that no formal resolution was passed by the council.

Mr. Douglas contended that, in the absence of such instructions, the defendants could not be held responsible.

Under ordinary circumstances I would agree with him; but when it is borne in mind that the contract was express as to the depths of the excavation, and that unless some alterations were made the work was perfectly useless, in my opinion, the defendants are responsible.

This was not a case of what may be called "extra work," but was absolutely necessary, and was in excess of what the defendants had expressly agreed with the plaintiffs should be covered by the price agreed to be paid, and was under the personal direction of their engineer.

I give judgment in favor of the plaintiff as regards the claim for work done between stations 7 to 14, on section 3; and direct a reference to the Master at Chatham to ascertain the amount.

I dismiss the other items of the plaintiff's claim.

The question of costs is reserved.

In Michaelmas Sittings, *Douglas*, Q. C., for the defendants, gave notice of motion to set aside this judgment, and to enter judgment for the defendants. The grounds upon which the motion is based, sufficiently appear in the judgment of the Court.

During the same sittings, December 9, 1887, *Douglas*, Q. C., supported the motion, and referred to *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48; *Robins v. Brockton*, 7 O. R. 481; *Thorn v. Mayor, &c., of London*, 1 App. Cas. 120; *Silsby v. Corporation of Dunnville*, 8 A. R. 524; *Cross v. Corporation of Ottawa*, 23 U. C. R. 288; *Scott v. Corporation of Peterborough*, 19 U. C. R. 469; *Gibson v. Corporation of*

Ottawa, 42 U. C. R. 172 ; *Dillon* on Municipal Corporations, 3rd ed., ch. 14, p. 434, *et seq.* ; *Wright v. Corporation of Grey*, 12 C. P. 479 ; *Dobson v. Hudson*, 1 C. B. N. S. 652 ; *Behn v. Burness*, 3 B. & S. 751, 753-7 ; *Addison* on Contracts, 8th ed., 401-2.

Moss, Q. C., and *Shoebotham*, contra, referred to sec. 574 of Municipal Act, 1883 ; *Fletcher v. Gillespie*, 3 Bing. 635 ; *Pim v. Municipal Council of Ontario*, 9 C. P. 304 ; *Robins v. Brockton*, 7 O. R. 481 ; *Dillon* on Municipal Corporations, 2nd ed., secs. 132, 174.

February 11, 1888. MACMAHON, J.—A petition having been presented to the township council of Oxford under sec. 570 of the Consolidated Municipal Act of 1883, by the requisite number of owners of the property to be benefited, for the draining of a certain part of the township, an examination of the locality proposed to be drained was made by Sherman Malcolm, a Provincial Land Surveyor, appointed by the council, who prepared plans and estimates of the work to be done, and made an assessment of the real property to be benefited by such work.

A by-law, founded upon such petition, and the examination, plans, estimates and assessment of the surveyor was passed by the township council on the 28th May, 1885, for the construction of a drain known as the Stover drain.

The contract between the parties for the construction of this drain was under the corporate seal of the defendants.

The stations from 7 to 14, referred to in the judgment of the learned Chief Justice, is a distance of 84 rods, and, according to the profile prepared by the surveyor, it shews that the deepest excavation along the line of the drain is between these stations, so it was deemed necessary to have that portion of the drain tiled and covered, and provision is made in the contract for such tile being laid by the plaintiff.

It appears from the evidence that about the year 1883 Malcolm had made a survey, and taken the levels for this drain, planting stakes along the line upon which were

marked the depths of the cuttings at the various stations. These stakes were lost or removed, and others substituted by Mr. McDonnell, another surveyor who made a survey and ran levels over the same ground subsequent to the Malcolm survey; and it was by those stakes so substituted by McDonnell that Malcolm let the contract to the plaintiff.

Malcolm was, as the engineer and commissioner of the defendants, frequently on the ground during the progress of the work, and when the plaintiff was laying the tiles between sections 7 and 14 on the bottom of the drain. According to the depth of the excavations marked upon the stakes, and according to a paper, which the plaintiff states was furnished by the engineer, shewing the depths of the cuttings at the different stations as taken from the profile, it was discovered by Mr. Malcolm, on running the levels, an error had been made in taking the original levels either by himself or McDonnell; and, as a consequence, the tiles already laid by the plaintiff would require to be taken up and relaid; and the plaintiff was directed by the engineer to remove the tiles from the bottom of the drain, and to excavate through a bed of quicksand between stations 7 and 14 to a depth varying from nineteen inches to three feet in excess of the depth marked on the profile and stakes.

Without this extra excavation being done, it is not disputed that the tile drain would not carry off the water: that in fact, if laid down according to the levels marked upon the profile, the tiles would form an arch; and it therefore became a work of necessity to make this extra excavation, or else all that had been done on the drain would have been abortive and useless.

Mr. Douglas in supporting his motion to set aside the judgment of the learned Chief Justice, relied principally on the 5th ground taken in his notice of motion, that "the defendants are not and could not be made liable for the said extras, even if extra work was done; as the defendants were, in constructing said drain, merely trustees and officers under the statute for the ratepayers assessed for

the construction of said drain, and had no powers, nor were they under any liability, except under the provisions of the statute and by-law under which they were acting; and the work claimed for was not done for the defendants, nor did they derive any benefit therefrom for which they can be held liable; and there was no contract, express or implied, on which they could be held liable."

If the defendants are legally liable for the extra work arising out of the express contract entered into between themselves and the plaintiff, they are not prevented from making an assessment and levying a rate upon the property of those benefited by the drain, for the purpose of meeting the liability. In fact section 574 of the Consolidated Municipal Act of 1883, expressly provides for such a contingency: "In case any by-law already passed, or which may be hereafter passed by the council of any municipality for the construction of drainage works by assessment upon the real property to be benefited thereby, and which has been acted upon by the construction of such works in whatever part does not provide sufficient means * * for the completion of the works * * the said council may from time to time amend the by-law in order fully to carry out the intention thereof, and of the petition on which the same was founded." And by 49 Vict. ch. 37 sec. 31, (O.), sec. 592 of the Consolidated Municipal Act, 1883, is repealed, and by the section substituted therefor, it is provided that, "Where, on account of proceedings taken under this Act, or The Ontario Drainage Act, or other Acts respecting drainage works and local assessments therefor, damages are recovered against the corporation * * all such damages or any sum of money that may be required to enable the corporation to comply with any such judgment * * made in respect thereof, shall be charged *pro rata* upon the lands and roads liable to assessment for such drainage works."

The Legislature has, by the enactments above referred to, clothed the council with the necessary authority to make provision for such a case as this.

The other point argued was as to the non-liability of the defendants because there was no contract under the seal of the defendants by which they could be made liable for the payment of this increased excavation; and *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48, was cited as a conclusive authority against the plaintiff recovering in this action.

That case was a decision under sec. 174 of 38 & 39 Vic. ch. 55 (Imperial Act), by which every contract made by an urban authority whereby the value or amount exceeding £50 shall be in writing and sealed with the common seal of such authority; and the action being for a sum in excess of £50, it was held that that section was imperative and not directory: that, even assuming that the contract was founded on an executed consideration, the plaintiff could not recover, for the section applied to every contract for a sum exceeding £50.

Bramwell, L. J., in his judgment, at p. 53, refers to the argument addressed to the Court, as to the plaintiff in that case being entitled to recover at common law because the defendants have had what is called the benefit of the contract, and says "This doctrine exists to some extent, or to some amount: that where a man had done work for a corporation under a contract not under a seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether it is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and as far as I know to cases in which it could be said that the work is such as was necessary; that it was work which if the corporation had not ordered, they would not have done their duty. * * That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done."

Suppose that in addition to the contract containing the provision in regard to the depths of excavation between stations 7 and 14 being as marked on the profile,

it had stated it was all earth cutting between those stations, and it turned out that the greater portion was solid rock, it could scarcely be urged, with any show of reason, that the plaintiff would be obliged, under his contract, to excavate the rock without compensation beyond the price for which he had agreed to excavate the earth. Yet that is what he would have been obliged to do, if the argument of defendants' counsel is carried to its logical conclusion. For what is the difference between excavating rock, which it was never contemplated by the parties at the inception of the contract should be excavated, and the excavation of the same quantity of quick-sand it was never intended should be excavated, and which, under certain circumstances, may be just as difficult and expensive to remove as rock excavation? I cannot see any different principle which can be applied to the illustration I have given.

Had it turned out to be rock instead of earth excavation, the plaintiff's right to abandon the contract or to go on and recover for all such extra work as was not within the contract, as for remuneration on a *quantum meruit* for the work so done is, I think, strongly supported by the judgment of Lord Cairns, in *Thorn v. Mayor, &c., of London*, 1 App. Cas. 120, at pp. 127-8.

Pim v. Municipal Council of Ontario, 9 C. P. 304 (in appeal), is a clear authority in favor of the plaintiff's right to recover. There a contract had been entered into between the defendants and one Wallace, for building a Court House, but as Wallace had not completed it by a day named it was taken off his hands by the architect under authority of the building committee of the council, and Pim was employed by the architect so acting to finish it, to be paid by estimates as he proceeded, without any written or sealed contract, or any specific price being agreed upon. Pim completed the work to the satisfaction of the architect. Pim recovered a verdict for £1,051; and the defendants moved to enter a nonsuit, on the ground that they had not contracted with him under seal; were not liable in law, and that £6,000 only being authorized

by by-law on the works, the committee exceeded the sum independent of the balance claimed by Pim in the action; and that the defendants were not liable therefor.

The Court below entered a non-suit; but the Court of Appeal set the nonsuit aside, and ordered judgment to be entered for the appellant (Pim), on the ground that the contract had been executed, and the corporation had received the benefit of the plaintiff's work and labor.

The Chancellor in his judgment, at p. 308, says: "In *Hall v. Mayor of Swansea*, 5 Q. B. 526, Lord Denman rests the judgment of the Court of Queens Bench, which has not, I believe, been questioned, upon the ground of necessity; and that language of Lord Denman has since been translated by Lord Campbell to mean 'no other than a moral necessity;' that the defendants should pay their debts, or as Mr. Justice Erle has expressed the same sentiment, 'that it was absolutely necessary that defendants should be compelled to do that which common honesty required.'—*Low v. London and North Western R. W. Co.*, 17 Jur. 376. Now if the necessity in *Hall v. Mayor of Swansea*, was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least, in cases circumstanced like the present, when the consideration has been executed and the corporation has received all that it could have required if there had been a formal contract under the corporate seal." See also, *Robins v. Brockton*, 7 O. R. 481.

Malcolm, the engineer and commissioner of the defendants, instructed the plaintiff to proceed with the extra excavation consequent upon the mistake made in taking the levels. If it was a necessity that this should be done to make the drain effective, and was in excess of what the plaintiff had agreed to do under his contract, then, the defendants having received the benefit of the plaintiff's work and labor, should pay for it.

I have not considered the question as to whether the defendants have not, by the terms of the contract, guar-

anted to the plaintiff that he would not be required to excavate that portion of the drain which was to be tiled to a greater depth than is indicated on the profile ; and, if that were so, whether the plaintiff would not be entitled to recover against the defendants for a breach of the warranty.

Should it turn out that the township is liable on this ground, an amendment should be made to meet the justice of the case.

There is no provision in the contract for the payment by the defendants for extra work, so that this increased excavation, being outside the contract, the defendants would have been obliged to provide for its being done, and to pay for it, if the plaintiff had refused to do it.

The learned Chief Justice has found that it was necessary work, and the evidence supports the finding.

The motion will therefore be dismissed, with costs, and the judgment of his lordship, the Chief Justice, affirmed.

GALT, C. J., and ROSE, J., concurred.

[QUEEN'S BENCH DIVISION.]

BERTRAM & COMPANY V. THE MASSEY MANUFACTURING
COMPANY ET AL.

Sale of goods—Contract—Delivery of part—Absence of brand—Quality of goods—Testing—Acceptance—Property in part not delivered—Costs.

The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire Crown Bar iron of the T. K. brand. A part of the iron was delivered to the defendants, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it, and finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand.

Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to the defendants merchantable iron bearing on its face the genuine brand contracted for; but in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co., of the quality usually indicated by the Crown brand, and so the defendants would have the right to test it, and according to the findings of the jury would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard, did not estop the defendants from shewing that the portion which was unbranded was also below the standard. But

Held, that the defendants, having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession.

Held, also, that the property in the part of the iron which was not delivered to the defendants, must be taken to remain in the plaintiffs; for the defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it.

The action was treated as one for the price of iron which the defendants accepted, and for damages arising from their refusal to accept the remainder, and, in accordance with the findings of the jury, which in the opinion of the Court were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only, (the damages having been negatived by the jury); and for the defendants upon their counter-claim for damages sustained from the breach of contract, other than by reason of the inferior quality of the iron; and the plaintiffs were allowed the costs of the action, and the defendants the costs of their counter-claim.

ACTION by plaintiffs, who were iron merchants carrying on business at Toronto, against the Massey Manufacturing Company, an incorporated company carrying on the busi-

ness of manufacturing agricultural implements at Toronto, to recover \$13, 732.35, the contract price of certain iron sold by them to the defendants, or damages for the defendants' refusal to accept the same.

The action was based upon an offer in writing by the plaintiffs to sell, and an acceptance by the defendants, following upon conversations between the plaintiffs and Mr. H. A. Massey, the president of the defendants' company, with regard to the matter, it being understood by both parties that the iron required was to be of British manufacture. The offer and acceptance were set out in the statement of claim, and were as follows :

Toronto, 27th August, 1885.

MASSEY MANUFACTURING COMPANY.

As requested we beg to quote you for iron as under ; specifications as shewn us to-day, quantity say from 200 to 600 tons. Specification to be in our hands by the 31st inst.

Staffordshire Crown Bars, B. N. F., T. K., S. & H., Shelton ; or equal ; Brand supplied our option ; \$1.57 per 100 lbs., including $\frac{1}{2}$ in. Rd. and Sqr. and Bars cut to length.

7-16 Rd. and Sqr. 20c. per 100 lbs. extra, advancing 15c. on each extra over 7-16 in. ; Band iron 25c. per 100 lbs. extra. Terms six months note, or 4 per cent. cash, from date of delivery at your works. Regarding sheets we will quote you in the morning ; will be very much pleased to receive your order, and can guarantee satisfaction and prompt delivery. This offer is subject to your acceptance by to-morrow forenoon.

Yours truly,

BERTRAM & Co.

P.S. Will accept order for sheet iron 14, 16, 18, 20, 22, G. D. \$1.90 per 100 lbs. and 22 G. at \$2.10 per 100 lbs. and Bolt iron at \$1.64 per 100 lbs. Terms, &c., as above.

BERTRAM & Co.

Office of the Massey Manufacturing Company.

Toronto, August 28th, 1885.

MESSRS. BERTRAM & Co., Toronto.

GENTLEMEN,—We are in receipt of yours of the 27th inst., giving prices and terms for our iron, which we accept, and enclose specification for a part of our requirements ; will furnish you with a further specification before the first of next month, if possible.

Yours truly,

H. A. MASSEY, *President*.

The specifications promised by the defendants in their letter of acceptance were furnished by them, and the plaintiffs

elected to supply the T. K. brand of Staffordshire Crown Bar iron.

The initials T. K. were the brand of a well-known manufacturing company at Kids Grove, in Staffordshire, called the T. Kinnersley Company. The iron was ordered by the plaintiffs through a firm of A. G. Kidston & Co., iron merchants in Glasgow, and began to arrive in Toronto about the middle of September, 1885.

Upon its arrival the defendants proceeded to test it, and to use certain quantities of it, while objecting to the quality, and a correspondence and several interviews took place between the plaintiffs and the defendants' officers; the defendants finally refused to accept any further delivery of the iron, and offered to return that which was in their possession; the plaintiffs on their part tendered the remainder of the iron and upon the defendants' refusal to accept it stored and insured it, and it was still in their possession at the time of the trial.

The plaintiffs' statement of claim alleged that they imported the iron in pursuance of the contract and delivered part to the defendants, who actually received the same, but refused to accept the remainder, although it was offered and tendered to them, and also refused to pay or give their note for the price; the plaintiffs claimed \$13,732.35, the contract price of the iron, and the expenses they had incurred for demurrage, storage, &c., in consequence of the defendants' refusal to accept it, or, in case it should be held that the plaintiffs were not entitled to recover the price of the iron, but damages only for the defendants' refusal to accept, then the plaintiffs claimed damages for the defendants' refusal to accept the iron which they had not taken, and the expenses of demurrage, &c.

The defendants denied the making of the contract, and pleaded the Statute of Frauds; they set up that the plaintiffs were aware of the nature of the business carried on by the defendants, and of the various kinds of implements and machinery manufactured by them: that the plaintiffs had frequently during July and August, 1885,

solicited orders for iron to be supplied to the defendants for the purposes of their manufacturing business, and urged their intimate knowledge of the nature of the defendants' business as a reason why orders should be given them; that the plaintiffs represented to them that the iron they could and would furnish to the defendants, if an order were given, would be fit for the purposes required by the defendants, of which the plaintiffs had particular knowledge, and that the iron would be of a well-known and standard brand called "Shelton," or would be equal in quality thereto; they also set up that the plaintiffs' offer of 27th August, 1885, contained an agreement on their part that the iron to be supplied should be equal to the "Shelton" brand, and a guarantee that it should be of a quality and kind to the satisfaction of defendants, and that it would be delivered promptly on receipt of order; and that, relying upon the plaintiffs' statements and representations, they gave an order for iron to be delivered by the plaintiffs, and accepted the plaintiffs' offer. They denied that the plaintiffs had ever delivered to them the iron so ordered, or any part of it; they said that the plaintiffs did about 1st October, 1885, deliver at the defendants' works in Toronto a certain quantity of iron purporting to be in pursuance of their agreement, and requested the defendants to test it, which they proceeded to do, and the said iron upon such testing was found to be of a very inferior and bad quality, and totally unfit for the purposes for which it was ordered, and the defendants forthwith thereafter so notified the plaintiffs. That the iron was not exact to size, nor true and round, nor cut to lengths according to the specifications furnished. That the plaintiffs admitted the iron which had been delivered and tested was of a bad and inferior quality, but requested the defendants to take in further quantities of the iron, asserting their confidence that the further delivery would upon being tested shew better results, and that the defendants in accordance with such request did take in further quantities and continued to test them, the result being that the whole

of the iron delivered was found to be of the same bad and inferior quality, as the plaintiffs admitted. The defendants denied that they ever accepted any part of the iron ; they said that it was all of an unmerchantable quality, and not fit for manufacturing purposes, and was not in accordance with the contract, as the plaintiffs well knew. That so soon as the defendants discovered the nature and quality of the iron taken in by them, they notified the plaintiffs that they would not accept it, and requested them to remove what had been delivered, and that the plaintiffs did remove part of it, and that the whole of the iron delivered to them, except what had been used in testing, was now in the possession and control of the plaintiffs, and subject to their order. They denied being indebted to the plaintiffs in any sum whatever, and they set up the want of their corporate seal to the alleged contract. By way of counter-claim they repeated the allegations as to the quality of the iron tendered them, and claimed damages for the plaintiffs' breach of contract to deliver the quality of iron specified in the contract, and claimed \$10,000 damages for stoppage of their manufacturing business, loss of profits, and the increased price they had to pay for iron to replace that which plaintiffs should have furnished.

H. A. Massey, the president of the defendants' company, was added as a defendant by amendment, with an allegation that he had represented himself to have authority to enter into the contract in question on behalf of the company ; that he and the company now sought to repudiate the contract on the ground that he had no such authority ; and the plaintiffs now claimed that he should be made liable to them for the damages they should sustain in case it should be held that he had no such authority. This portion of the case, and Mr. Massey's answer to it are not material, as the finding of the jury that the defendants the company had conferred upon him authority to make the contract was not moved against.

The action was tried at the Toronto Fall Assizes in 1886, before the late Sir Matthew Cameron, Chief Justice of the

Common Pleas Division, with a jury, and the trial occupied several days.

The learned Chief Justice submitted to the jury a series of questions, which, with the answers given to them, were as follows:—

1. Had the defendant Massey authority from the defendants the Massey Manufacturing Company to enter into contracts for them, such as that in the plaintiffs' statement of claim mentioned; and had he authority to enter into, and did he make, the said contract in the statement of claim mentioned? A. Yes.

2. Did the plaintiffs deliver to the defendants or tender to them the iron in the statement of claim mentioned? A. Yes.

3. If they did so deliver or tender to the defendants the said iron, was such iron manufactured by the T. Kinnersley Company, and sold by them to Messrs. Kidston & Co. as T. K. Crown iron? A. Yes.

4. Was the bulk of the iron delivered or tendered to the defendants T. K. Crown iron or iron equivalent thereto? A. No.

4a. Had the plaintiffs a knowledge of the purpose for which the defendants required the iron? A. No.

5. Was the iron so delivered or tendered merchantable iron? A. Merchantable, but not equal to the standard T. K. Crown brand.

5a. Was there an undue or unreasonable quantity of the iron unbranded or unfit for the use for which the defendants required the same? A. Yes.

6. If the iron so delivered or tendered was not merchantable, was it unmerchantable by reason of defect in the original manufacture, or by reason of any defect, injury, or damage sustained by such iron after manufacture? A. By the original manufacture.

7. Did the defendants use any of the plaintiffs' iron more than necessary to make a reasonable and fair test of the quality of the iron? A. Yes.

8. If the defendants did use more of the iron than necessary for a reasonable and fair test, was it so used by the direction or with the consent and authority of the plaintiffs? A. No.

10. Was there any iron of the plaintiffs used by the defendants in testing the same after the defendants refused to accept the iron under the contract? A. Yes.

13. If the iron was in accordance with the contract, what damages have the plaintiffs sustained by reason of the defendants' refusal to take and accept the balance of the iron not taken in by the defendants? A. No damage.

14. If the iron tendered or delivered by the plaintiffs to the defendants was not in accordance with the contract, what damages, if any, have the defendants suffered by reason of the non-performance by the plaintiffs of their contract? A. Two hundred dollars.

15. Was there any warranty, outside of the written contract, on the part of the plaintiffs that the iron should be equal to the brand known as Shelton? A. No.

The jury found a verdict for the plaintiffs for the amount of the iron received by the defendants at the contract price, less 15 per cent.

Upon these answers judgment was directed to be entered for the plaintiffs for \$5,523.68, that being the sum agreed on by counsel as the price of the iron received by the defendants at the contract price, less 15 per cent., together with their costs of suit; and judgment was also directed to be entered for the defendants on their counter-claim for \$200 with full costs; and the plaintiffs' action as against the defendant Massey was dismissed, without costs.

At the Hilary Sittings, 1887, the plaintiffs obtained an order nisi to increase their verdict to the full amount of the purchase money of the iron with interest and costs, and to disregard and set aside such answers of the jury as might be inconsistent with the plaintiffs' right to have this done; and to dismiss the defendants' counter-claim, upon the ground that upon the law and the facts the plaintiffs were entitled to the full amount of their claim, and the defendants were not entitled to any relief upon their counter-claim.

During the same sittings the defendants applied for a cross-order nisi, which was granted them at the Easter Sittings of the Divisional Court, 1887, to set aside the answers of the jury to the above questions numbered 7, 8, 10, 4a., and enter a verdict for the defendants, or for a new trial upon the issues submitted by those questions; or to enter a general verdict for the defendants, or to vary the judgment by reducing it to the value of the iron found to have been received and accepted by the defendants, and by giving to the defendants the general costs of defence as well as of counter-claim, or at all events the costs of the issues upon which they had succeeded, and to increase the damages upon their counter-claim by the amount of 15 per cent. of the contract price of the

iron, or for a new trial upon their counter-claim, upon the ground of the improper rejection of evidence as to the damages upon their counter-claim.

Notices of motion were also served by both parties, and the orders *nisi* and motions were argued during the Michaelmas Sittings of the Queen's Bench Divisional Court, 1887.

Robinson, Q.C., and *Lash*, Q.C., for the plaintiffs.

McCarthy, Q. C., *Watson*, and *J. M. Clark*, for the defendants.

March 9, 1888. STREET, J., (after stating the facts).—A careful perusal of a considerable portion of the mass of evidence taken at the trial and under the commission in England has satisfied me that there is evidence to sustain all the findings of the jury, and that in determining the questions involved we must treat those findings as conclusive upon the facts, and must not give effect to the motions of either the plaintiffs or the defendants to disregard or set aside any of them. Read without the context supplied by the charge of the learned Chief Justice which accompanied and explained them, some of the answers do certainly appear at first sight inconsistent with one another, but much of the doubt which has been suggested as to their meaning and intention will be found to disappear when they are read in connection with the charge.

The findings of the jury naturally separate themselves into those which relate to the contract, those which relate to the plaintiffs' acts under it, those which relate to the defendants' acts under it, and those which relate to the damages claimed by the parties to it.

Those which relate to the contract are those numbered 1, 4a., and 15. No. 1 establishes that Mr. Massey had authority from the defendants to enter into the contract in question on their behalf ; No. 4a. that the plaintiffs had no knowledge of the purposes for which the defendants

required the iron ; and No. 15 that there was no warranty, outside of the written contract, on the part of the plaintiffs that the iron should be equal to the brand known as "Shelton."

These findings narrow the contract down to that which is contained in the written offer and acceptance, dated respectively the 27th and 28th August, 1885.

Under that contract the plaintiffs reserved to themselves an option to furnish any brand of Staffordshire Crown Bar iron which should be either one of the four brands specified in the writing, or equal to any one of those brands ; and they exercised their option by selecting T. K. as the particular brand of Staffordshire Crown Bar iron which they should be bound to furnish. The offer to "guarantee satisfaction" adds nothing to their liability to carry out their contract, and the plaintiffs have not complained that the promise of "prompt delivery" has not been complied with. The plaintiffs' contract was therefore, so far as this action is concerned, an exceedingly simple one ; they were to deliver to the defendants at their works in Toronto, within a reasonable time, Staffordshire Crown Bar iron of the T. K. brand, according to the defendants' specifications, not exceeding say 600 tons in quantity.

The findings of the jury as to what they did in performance or towards performance of this contract are those numbered 2, 3, 4, 5, 5a, and 6. By their answer to question No. 2 they say that the plaintiffs did deliver to the defendants or tender to them the iron as in the statement of claim mentioned. It is evident from the portion of the charge of the Chief Justice having reference to this question that it was intended to be merely a formal one, for he says, at page 15 of the charge : "That question is put to you ; no doubt the iron was tendered ; a portion of it was received, the balance was rejected, and had to be taken back and placed in warehouse on Mr. Geddes's wharf ;" and it was clearly not intended to include in this question any finding as to the quality of the iron tendered, or as to whether it was such as to comply with the contract. In

answer to the questions 3, 4, 5, and 6, they say that the iron so tendered was manufactured by the T. Kinnersley Company, and sold by them to Messrs. Kidston & Co. as T. K. Crown iron, but that the bulk of it was not T. K. Crown iron, or iron equivalent thereto, and that it was merchantable iron, but not equal to the standard T. K. Crown brand, by reason of defects in the original manufacture; and in answer to the question 5a. they say that an undue or unreasonable quantity of it was unbranded, or unfit for the purpose for which the defendants required it. Their answer to the latter question does not shew whether they intended to find that a large quantity of the iron was unbranded, or to find that it was unfit for the defendants' purposes. There is very strong evidence shewing that a considerable proportion of the iron delivered to the defendants was, as a matter of fact, unbranded. It would therefore be impossible to treat the answer as being intended to apply only to the latter and not at all to the former branch of the question. The answer being absolutely ambiguous, it would be necessary to send an issue upon this point down to another jury, if it were essential to a determination of the action that this question as to the branding should be answered; the question as to whether the iron was or was not fit for the defendants' purposes seems to raise an immaterial issue. For the purposes of this part of the case, I shall therefore treat the question submitted to the jury as if it had been a single one relating to the branding alone, and as if the answer had been that an undue or unreasonable quantity of the iron was unbranded.

Whether the defendants having a right to receive iron of this particular brand, were entitled to require that it should bear the brand upon its face, is a question of fact upon which the jury were not asked for their opinion; *Hopkins v. Hitchcock*, 14 C. B. N. S. 65. The defendants do not seem to have treated the absence of the brand as creating a difficulty in the way of their accepting the iron; their objections were entirely confined to its quality; and the fact that the brand was absent upon large quantities of

the iron, though noticed from the beginning, seems never to have been objected to. Had they bought the iron in order to resell it, the brand would no doubt have formed a material part of the contract, but as it was known to both parties that the iron was to be used up at once in the manufacture of the defendants' implements, the actual presence of the brand might well be treated as of no importance, provided the quality were up to the standard of the brand which they had contracted for. So far as the plaintiffs are concerned, however, the presence or absence of the brand upon the face of the iron was of much importance. The brand which they contracted to supply represented a well known quality of iron manufactured by a particular company. The brand of the manufacturer upon the face of the iron would be treated by purchasers as the only assurance to them of the quality of the iron, and the duty of a dealer who had contracted to supply iron of that brand would be performed when he had supplied to his vendee merchantable iron, bearing on its face the genuine brand contracted for; he would be under no implied guarantee that the iron was of any particular quality or fit for any particular purpose; the buyer in ordering the brand for which he had stipulated would be taken to know its qualities, and upon receiving it in a merchantable condition and authenticated by the presence of the manufacturer's stamp, would be entitled to nothing more; *Dounce v. Dow*, 64 N. Y. 411; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288. But in the absence of that authentication, the duties of the vendor and the rights of the purchaser must necessarily be altered. If the presence of the brand is a material element in the contract, the buyer can reject the iron at once; if its presence is not material it must be because the reference to a brand in the contract is intended to describe the quality of the iron to be delivered, and the contract here would be read as one for the sale of iron manufactured by the T. Kinnersley Company, of the quality usually indicated by their Crown brand; and the plaintiffs could not discharge

themselves by tendering iron manufactured by that company and sold by them as Crown iron, but which they had neglected or refused to brand as such ; the defendants would have the right to test it before accepting it, in order to ascertain whether it was equal in quality to the usual Crown iron put forth by the Kinnersley Company, stamped with their Crown brand ; and the jury having found that the iron which was tendered was neither branded nor equal in quality to the standard or usual quality of T. K. Crown iron, it follows that the defendants might clearly have rejected it all. It is true that it appears from the evidence that there was no difference between the quality of those portions of the iron delivered which did, and those which did not, bear the T. K. Crown brand ; but the jury have found that none of the iron was equal to the standard ; and the fact that the portion that was branded was below the standard does not estop the defendants from shewing that the portion unbranded was also below the standard.

The questions numbered 7, 8, and 10, relate to the defendants' acts under the contract, and the jury have found in answer to these questions that the defendants used more of the plaintiffs' iron than was necessary to make a reasonable and fair test of its quality ; that the portion so used was not so used by the direction or with the consent and authority of the plaintiffs ; and that some of the plaintiffs' iron was used by the defendants in testing after they had refused to accept it under the contract. These conclusions are drawn by the jury from a great mass of conflicting evidence, and the defendants by their rule ask that the Court should set them aside, and grant a new trial upon the particular issue involved in them ; but a perusal of the evidence of the defendants' witnesses, Mr. Massey and Mr. Garvin, the assistant superintendent, shews that there was ample material upon which these findings can be supported, and the correspondence which took place between the parties at the time does not help the defendants' case.

The plaintiff Mr. George Bertram seems to have mentioned at his first interview with Mr. Garvin, when the

quality of the iron was complained of, that the iron had been bought by brand; the defendants' view from the beginning seems to have been that they were entitled to reject the iron if it should not turn out to be suitable for the purposes of their machines; this was not the effect of the contract, but they were, in the absence of an actual brand, entitled to a particular quality of iron, and had the right, by testing it, to ascertain the quality of what was offered to them. This they did, speaking generally, in two ways; one by trying it hot and cold upon an anvil; the other by working the different sizes into the parts of the machines for which they were intended. It may very fairly be inferred from the evidence that the plaintiffs, upon the various occasions when they were at the defendants' works, did request the defendants to continue to receive the iron and continue to test it; and if the defendants had done nothing more than to continue in various ways to ascertain its quality, the plaintiffs could not have contended with any shew of reason that by continuing to do so the defendants had waived their right to reject it. But to use the iron for the purpose of testing it, and to use it for the purpose of manufacturing the machines for which it was intended, are two very different things, and it is stated by Mr. Garvin, pp. 506-7, that the plaintiffs' iron was used in 800 or 1000 machines, which the defendants manufactured, and that it was probably used up to the April or May following the October in which the controversy took place. It is obvious that in making use of the plaintiffs' iron to this extent in their business the defendants were doing something with it which they could only do with iron which was their own property, and something which could not by any stretch of imagination be treated as a mere test of the iron, for the test would have ended when it was found whether or not the iron would stand the working necessary to enable it to form a part of the machine into which it was put.

If it had been so used in the actual manufacture of the defendants' machines with the consent of the

plaintiffs, and upon the understanding that the defendants should only be obliged to pay for what they used in this way, and that by so doing they should not be prejudiced in their right to reject the remainder, then the rights of the parties would of course have been altered to that extent; but apart from the inherent improbability that the plaintiffs would have been unwise enough to enter into such an arrangement, the correspondence during the period when the testing was being proceeded with negatives any such understanding, and the defendants do not in their statement of defence set up that the plaintiffs did anything more than request the defendants to continue to take in and test the iron, and to report the result of their tests. It is true that Mr. Massey and Mr. Garvin both state that the plaintiffs asked them to continue to test the iron, and to use such portions of it as were fit for their purpose; but this is denied by the plaintiffs, and the jury have in effect found that the defendants had not the consent of the plaintiffs to the actual use they made of the iron as distinguished from a test of its quality.

The truth appears to be that the defendants had a large number of men employed and were anxious to proceed with the manufacture of machines for the next season's trade, and that except the plaintiffs' iron were used they must have shut down their works until other iron could be had. In their anxiety to keep their men at work they proceeded to use at first such portions of the plaintiffs' iron as they found suitable for their purpose, and before they had fully realized the consequences of doing so, they had cut up and worked a considerable quantity of it into machines or parts of machines; when they did finally refuse to receive any more of it, they had manufactured into parts of their machines a good deal out of the earlier deliveries; and they continued afterwards to use in the manufacture of their machines the iron which they had cut up and worked before their final decision had been arrived at.

The effect upon their rights of so dealing with a portion of the iron without the consent of the plaintiffs is clearly

settled by many authorities. In *Wilds v. Smith*, 2 A. R. 8, the plaintiffs, merchants in New York, had sold to Bendelari & Co., merchants in Toronto, 50 bags of coffee; upon arrival in Toronto all but 15 bags were found to be stained and unmerchantable, and they informed the sellers' agent that they could not use it; they, however, sold the 15 bags before making their objection, and after doing so they sold 8 bags more; it was held by the Court, reversing the judgment of the Court below, that there being one entire contract for the 50 bags, the purchasers, by dealing with a portion of them as their own, had precluded themselves from rejecting the remainder.

In *Couston v. Chapman*, L. R. 2 Sc. App. 250, which was a sale of wine by sample, Lord Chelmsford says, at p. 255: "With regard to the wine not corresponding with the sample, there can be no doubt whatever that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to conform to the sample. And, therefore, upon the discovery of the fact, the appellants had a clear right, not, as appeared to be contended in the course of the argument, to retain the good wine and return the bad, but to rescind the contract for those lots altogether. The contracts being entire for each lot; the only way in which the appellants could discharge themselves from their obligation was by returning, or offering to return, the whole of the lots." See also *Chapman v. Morton*, 11 M. & W. 534; *Harnor v. Groves*, 15 C. B. 667; *Parker v. Palmer*, 4 B. & Ald. 387; *Elliott v. Thomas*, 3 M. & W. 170; *Lucy v. Mouflet*, 5 H. & N. 229.

The cases of *Kemp v. Falk*, 7 App. Cas. 573; *Dixon v. Yates*, 5 B. & Ad. 313, and several other cases of the same character, were cited by counsel for the defendants in support of their contention that the question as to whether the dealing by the defendants with a portion of the goods in dispute was to be treated as an acceptance of the whole, was one of intention, and that the onus of showing the intention of the defendants to accept the whole was thrown upon the plaintiffs. But those cases are cases where a right to stop *in transitu* was claimed, and the

question in each of them was not whether the purchasers had accepted the whole of the goods covered by one entire contract, by dealing with a part, but whether the parties had intended that a *delivery* of a part should operate as a delivery of the whole. Lord Blackburn says in *Kemp v. Falk*, at p. 586: "In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intended it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole." It is obvious that the question raised by those cases is an entirely different one from that arising here, which is whether a purchaser by dealing with a part of the goods without the consent of the the seller has precluded himself from rejecting the residue. In the present case it seems clear that the defendants, having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, a considerable quantity of what had been delivered to them as part of an entire contract, have precluded themselves from objecting to the remainder of that which came into their possession.

The remainder of the findings of the jury relate to the damages arising from the fact of the iron tendered being of a quality inferior to that to which the defendants were entitled under the contract. The questions are numbered 13 and 14, and in answer to these they have found that the plaintiffs sustained no damage by reason of the defendants' refusal to accept the balance of the iron not taken by them, and that the damage suffered by the defendants by reason of the plaintiffs not having delivered iron in accordance with the contract was \$200; in addition to which they have found that the iron taken by the defendants was worth 15 per cent. less than the contract price. By agreement of counsel the value of the iron taken by the defen-

dants, after allowing this 15 per cent. off the contract price, was \$5,523.68.

The property in the iron which was not delivered to the defendants must be taken to remain in the plaintiffs, because the defendants had never exercised their right to test it, and refused to receive it; something remained to be done by them before the plaintiffs could compel them accept it. This action may therefore be treated as one for the price of the goods which the defendants accepted, and for damages arising from their refusal to accept the remainder; the damages have been negatived by the jury, and the contract price of the goods delivered has been reduced to their actual value, as may be properly done in such an action; *Mondel v. Steel*, 8 M. & W. 358; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Church v. Abell*, 1 S. C. R. 442. The damages which the defendants have recovered on their counter-claim are the special damages, other than the inferior quality of the goods supplied, which they have sustained from the plaintiffs' breach of contract.

The award of costs to the plaintiffs has been complained of by the defendants; but I am of opinion that it is a perfectly proper one under the circumstances; the defendants denied *in toto* their liability to pay for the goods which came into their possession; the plaintiffs have succeeded in establishing their right to recover for these goods, though at a reduced price. If the defendants had paid a sufficient sum of money into Court, and admitted their liability, they would have been entitled to their costs, but not having done so, they must bear the costs of the action.

The result will be, that judgment should be entered in accordance with the direction of the late learned Chief Justice in favor of the plaintiffs in the action for \$5,523.68, with costs, and that the defendants should have judgment upon their counter-claim for \$200, with full costs; and both orders *nisi* and motions should be discharged, with costs.

ARMOUR, C. J., and FALCONBRIDGE, J., concurred.

Order accordingly.

[COMMON PLEAS DIVISION.]

SHEARD ET AL. V. LAIRD.

Undue influence—Deed procured through threats, etc.—Setting aside.

The defendant, a merchant and active business man, had endorsed a note for G. Subsequently G. made an assignment for the benefit of his creditors, and on defendant requiring security, G.'s wife gave defendant her note for the amount. She held some property which had been purchased by her husband and conveyed to her, which was to be sold and the note paid. G. sold the land, but instead of paying the note, absconded, leaving his wife. The defendant then went to Mrs. G., and by the use of abusive language and threats of criminal prosecution against her husband, and of exposure of herself and him in the papers, being of delicate constitution, frightened her into procuring her mother a very old woman in feeble health, influenced by the communication of the threats to her, to get the deed from her solicitor of a small property she owned, defendant giving strict injunctions not to inform the solicitor of the object, lest he should dissuade her, and to execute a deed to defendant, conveying the property absolutely to him, in payment of the debt, merely giving her back an informal memorandum evidencing her right to obtain a reconveyance on payment of the debt. At the same time he procured Mrs. G. also to execute the deed which contained a clause barring dower she had in the land, and which was absolute and unconditional, and without any right to her to redeem. The deed was executed in the office of the defendant's conveyancer, without anyone being present to advise plaintiffa.

Held, (reversing the judgment of ARMOUR, J., at the trial), that the deed could not be supported as against the mother, and must be set aside; and also, under the circumstances, as against Mrs. G.

THIS was an action to set aside a deed from the plaintiffs Mary Sheard, and Sarah J. Godbold, her daughter, to the defendant, on the ground of undue influence.

It appeared that Sylvester Godbold, the husband of the plaintiff Sarah J. Godbold, obtained from the defendant an accommodation endorsement of a note for \$500, in October, 1886, which note was discounted in the Merchants Bank, and falling due was renewed on the 5th of January, 1887.

The husband Godbold, was the maker. He made an assignment for the benefit of his creditors in March; and the defendant desiring security, the plaintiff Godbold, on the 4th of March, gave her note to the defendant, payable three months after date. She held some land at that time which had been purchased by her husband and conveyed

to her, and it was understood that the land was to be sold by the husband and the note paid out of its proceeds.

Shortly prior to the 5th of April, this land was sold to Mrs. Godbold's mother; and on the 4th of April, Godbold promised to pay the defendant the note the following day, but instead of doing so he left the country, going to Detroit, in company, it was said, with a woman not his wife.

The defendant not receiving the money went to Godbold's house, and what took place appears in the evidence of Mrs. Godbold and her daughter. The defendant admitted the accuracy of their statements as to his threats.

Mrs. Godbold testified as follows:—

On the 5th April, the day her husband left Galt, the defendant called on her, and asked for her husband, when she told him he had gone. The defendant then called him a liar and thief, and said he would warn the public and secret societies against him so that no one would trust him or have anything to do with him: that he was a black-hearted villain. He asked witness to try and get her mother to give security for the \$500 which defendant was liable for for backing the note, and said that if he did not get the security he would publish their names in every paper in Canada, in the Galt papers, and the leading ones in the States, and would get his revenge; that her husband need not think he would be let free to go about swindling people like that as swindlers, rogues, liars, and so on, which they were. Witness asked him to wait a week until she could hear from her husband. He said he would not wait twenty-four hours, and unless he had that security their names would be in the *Reformer* next day: that her husband had obtained goods on false pretences, and had swindled the firm of Gillard & Co., of Hamilton, out of \$8,000, on which they could imprison him; but that they had not taken any steps, but if he did not get that security he would see Gillard & Co., and help them all he could to imprison him: that he would see Irwin, whom he said her husband had swindled, and the three would join together, and each bear part of the expense to punish her husband;

and if he were to lose the money he was not that hard up but that he could spend another \$500 for the sake of punishing him : that her husband was a black-hearted villain, and ought to be shot, and that if he got the chance he would shoot him himself : that lots of better men were hung, and that his dirty, rotten carcass would be found in the ditch some day. Witness said it was not her fault ; when he said she was as bad as her husband, and had not lived with him so many years without knowing he was a thief and a liar. She said she would ask her mother, and the defendant said that he would come back at seven o'clock in the evening to get his answer.

In answer to the question, " In what frame of mind did this put you ? " the witness said she hardly knew what she was doing or saying.

The witness said she saw her mother, and told her the substance of what the defendant had said ; and her mother said it would be pretty hard to take the bread out of her own mouth to pay a debt she never owed. Witness told her this was the only alternative, and she consented.

Witness also said it agitated her mother. It put her mother in a state of nervous excitement ; she did not seem to be capable of thinking of anything else.

She said that defendant came back at 6 o'clock. Witness told him that her mother had consented, and that he should have it if her mother had something to shew that defendant did not take possession of the whole property. The defendant inquired where the deed from witness's husband to her mother was. Witness said it was in Mr. Durand's office, and had been placed there in consequence of a letter from her husband's creditors—a lawyer's letter. He said he hoped they had not given a power of attorney, and told her to get the deed from Mr. Durand and not tell him what they wanted it for : that the deed would be much safer in his hands than in Durand's. The next day witness said her mother went and got the deed from Mr. Durand, but did not tell him what they wanted it for, as they said they

were afraid to do so. The defendant called and looked at the deed. He said it was not completed--that witness's signature was not upon it, (witness not having barred her dower). He said he would shew it to Mr. McGovern, who would know whether it was all right. The witness at first objected to defendant taking the deed away, but ultimately allowed him to take it. The defendant came back in the evening, and brought Mr. McGovern with him. The witness then signed the deed. She also stated that at the time she signed the deed she was so frightened that she scarcely knew what she was doing: that she did not recover from the shock until the defendant left; that but for the threats, and what was said, she would not have signed the deed; and it was simply through the influence of the threats that she signed, or that she asked her mother to do so.

Mrs. Godbold's daughter was also called as a witness, and gave evidence similar to her mother. She said that her mother was a great deal excited by the threats, and it put her, the daughter, in the same state: that her grand mother, the plaintiff, could hardly speak of anything else; she was too frightened.

Mrs. Sheard's account of what took place was, that her daughter, Mrs. Godbold, told her that defendant said that Mrs. Godbold's husband had run away and had not paid him, and he wanted her to give security on her property for it, or he would publish Mr. and Mrs. Godbold as liars and rogues, stating the threats, &c., the evidence being similar to that detailed by the daughter. She said defendant threatened her if she mentioned the purpose for which she wanted it to Mr. Durand, or any one else, and that the defendant would not give her time to consult any one: that both her daughter and herself were not in good health and were nervous, and when she heard the threats she had not the courage to refuse: that she felt confused, and her heart failed to beat, she could not control herself. She said that she told her daughter that on account of the daughter's health she had not the courage to refuse or contradict her.

The defendant while admitting the accuracy of the evidence as to his threats, said that when he went to Godbold's house on the morning of the 5th, Mrs Godbold told him her husband was "down street;" and stated that in the conversation she seemed to sympathise with him, and obtained the security for him. As he put it, "she said she did not blame me, and seemed to take my part all the time."

Mrs. Godbold admitted saying, "that she did not blame him for feeling aggravated about the matter."

He further stated he did not believe they were excited. His answer to counsel, was: "I don't believe they were excited. This language was all on Tuesday forenoon, and this was not signed till Wednesday night."

He also stated he was a merchant in the town of Galt, a town councillor, and had experience in business, and that he had, in looking into the title to Mrs. Godbold's property prior to this, ascertained that Mrs. Sheard owned the land in question.

He also gave the following evidence in answer to Mr. Durand, the plaintiff's counsel:

Q. Do you recollect telling them not to tell me what they wanted the deed for? A. I do.

HIS LORDSHIP—What was the object of that? A. We had a conversation about it, and she wanted it kept quiet. I did so. I only wanted security, and I thought best to have the thing done quietly. She was quite willing, and did not object.

Q. Was that the cause of your saying that? Is that the story you told her? A. That is part of the cause.

Q. What is the other part? A. I may have thought that you might have asked her not to do it.

Q. When you had this instrument prepared, did the question of a mortgage come up; it was said between you and your solicitor that it would be better that it would be a deed? A. The lawyer said it would be well to have a mortgage; I said to have whatever was right.

Q. Notwithstanding it was spoken of, you took an absolute deed? A. Yes, a deed.

He gave to the plaintiff, Mary Sheard, the following undertaking :

" In consideration of \$500, with interest at the rate of 7 per cent. per annum for the same, and also costs of security for same, I hereby agree to give Mary Sheard the privilege of redeeming property conveyed by her to me this day, providing it is so redeemed within three years.

GEORGE LAIRD."

The term of " three years " had been altered from " two," as he says, at Mrs. Godbold's request.

A witness, Thomas McGovern, a conveyancer at whose office the deed was executed, stated that there were no threats used in his office, and that the plaintiffs seemed to know what they were doing.

A witness, Thos. Hamilton, landlord of the Godbold's, was called by the defendant. He stated that he called on the 9th : that Mrs. Sheard came to the door and appeared very much agitated or troubled. She told him that she was afraid her son-in-law had " gone off with another woman," and that she had made Laird secure, and left herself penniless.

The property was stated to be worth \$1,500, and subject to a mortgage of \$500, when the deed in question was given.

The learned Chief Justice found that there was no fraud: that the parties perfectly understood what they were doing; and that they were giving security to Laird for his liability; and he dismissed the action with costs.

In Michaelmas Sittings, 1887, *Durand* moved, on notice, to set aside the judgment entered for the defendant, and to enter judgment for the plaintiffs.

During the same Sittings, *Durand* supported the motion, and referred to *Williams v. Bayley*, L. R. 1 H. L. 200; *Baker v. Monk*, 4 DeG. J. & S. 388; *Waters v. Donnelly*, 9 O. R. 391; *Irwin v. Young*, 28 Gr. 511; *Armstrong v. Gage*, 25 Gr. 1.

Miller, contra, referred to *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152; *Campbell v. Balfour*, 16 Gr. 108.

January 24, 1888.—ROSE, J.—The facts may, it seems to me, be summed up as follows:

The defendant, a merchant, a town councillor, and a man of experience in business, has obtained from an old woman, sixty-nine years of age, stated to be in feeble health, a deed of her home without consideration, by means of threats used to her daughter and communicated to her; her daughter being also a delicate woman, as, in addition to her mother's evidence, was shewn by her fainting in the witness box; and obtained such deed from her, she being without advice and dissuaded by him from seeking advice.

The daughter at the time must have been in a highly nervous condition, in consequence of her husband's leaving home; and both women would appear to have been fit subjects to have been brought under the domination of a man like the defendant, who hesitated not to use the means of influence employed in this case.

It will be well to ascertain what is "fraud," or "undue influence" where no fiduciary or confidential relation exists.

The civil law always sets aside a contract procured by force or from a want of liberty in the contracting party. *Pothier* says, "That regard should be had to the age, sex, and condition of the parties; and that a fear which would not be deemed sufficient to have influenced the mind of a man in the prime of life, * * * might be judged sufficient in respect of a woman or a man in the decline of life." Pt. 1, ch. 1., art. 3, sec. 2, p. 25.

In *Kerr on Fraud and Mistake*, p. 162, the text-writer says: "But inadequacy of consideration, or the absence of independent professional advice, becomes a most material circumstance where one of the parties to a transaction is from age, ignorance, distress, incapacity, recklessness, weakness of mind, body, or disposition, or from humble position

or other circumstances unable to protect himself. In all such cases, whatever be the nature of the transaction, the *onus* of proof rests on the party who seeks to uphold it to show that the other performed the act or entered into the transaction voluntarily and deliberately, knowing its nature and effect; and that his consent to perform the act or become a party to the transaction was not obtained by reason of any undue advantage taken of his position or of any undue influence exerted on him." He cites a large number of authorities.

In *Hall v. Hall*, L.R. 1 P.&D. 481, at p. 482, Sir J. P. Wilde gave the jury instructions as to undue influence on a testator. He said: "On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. *Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort*; these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened."

In *Coward v. Hughes*, 1 K. & J. 443, Vice Chancellor Sir W. Page Wood, held invalid a promissory note obtained from a widow without it being explained to her that she was not liable on a promissory note made by her husband in his lifetime jointly with her. The new note was obtained in substitution for the old note.

In *Williams v. Bayley*, L. R. 1 H. L. 218, Lord Westbury commenting on the facts of that case makes the following observations applicable to the facts of this case: "A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he

ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation."

The law has lately been reviewed in our own Courts in *Waters v. Donnelly*, 9 O. R. 391, in which citations were made from *Slator v. Nolan*, 11 Ir. R. Eq. 367, 386, the judgments in that case being followed.

I find in the judgment of the learned Chancellor of Ontario, at p. 402, that "'Fraud,' is the term sometimes applied to characterize the conduct which the Court reprehends in this class of cases, but 'fraud' so used need not mean deceit or circumvention, it may mean an unconscientious use of the power possessed by one of the parties, arising out of their relative position or condition, as pointed out by Lord Selborne in *Earl of Aylesford v. Morris*, L. R. 8 Ch. 490, that 'if the parties meet under such circumstances as in the particular transaction, to give the stronger party dominion over the weaker,' then the principle is applied of requiring the one who gets the benefit to prove that the transaction was fair just and reasonable."

I think the facts of this case are such as throw upon the defendant such onus of proof.

The finding of the learned Judge, that the parties perfectly understood what they were doing does not assist the defendant; for, as said by Sir John Romilly, Master of the Rolls, in *Bentley v. Mackay*, 31 Beav. 143, at p. 151, "The usual instance of the exercise of undue influence is where the person influenced knows exactly what he is doing and is acquainted with the contents of the deed."

The fact that, notwithstanding the suggestion of the solicitor that it would better to have a mortgage, a deed absolute in form was obtained, is not without its significance, which is not destroyed by the statement in the evidence, that the defendant explained the matter to the solicitor "how it all was, he prepared that deed, and said that if it was redeemed at the end of

the time it would save expense; and that it would be better for all to have that instead of a mortgage."

It was certainly improvident in Mrs. Sheard to give the defendant a deed absolute in form, which might be (and has been) registered, accepting the above undertaking which is not in form for registering.

The fact that these women acted upon his suggestion of keeping secret from their solicitor their object in obtaining the deed, certainly seems to me to shew that they were under the dominant influence of the defendant; and the fact that he advised that such secrecy should be observed, fearing lest the solicitor would advise against it, robs him of any claim to consideration. He obtained from these women an undue advantage, they being without advice, he knowing or believing that if they had advice he could not obtain the advantage.

It would strike one that for a man in active business life, a local municipal legislator, to go to a house and heap upon a woman, in the absence of her husband, absent under the circumstances detailed in evidence, abuse of the nature shewn; to make use of threats, which would be exaggerated by nervous fear and anxiety; to suggest that her mother, an old woman, should make a voluntary gift to him of property to secure him against loss, otherwise that all the dire results threatened would follow; to prevent them obtaining advice, lest his scheme should fail; and in the absence of such advice to obtain a deed absolute in form which he might record, giving the grantor an informal memorandum to evidence her right to obtain from him a reconveyance on payment of the debt and costs, and to have the document executed in the office of his own conveyancer, no one present befriending the plaintiffs—is not conduct which satisfies the requirement that the defendant should "prove that the transaction was fair, just, and reasonable."

I observe that in *Kerr on Fraud and Mistake*, at p. 108, the author says that "whether a transaction can be set aside on the ground of undue influence, where the influence has been exercised, not by the party obtaining the benefit,

but by the third person, appears to be doubtful," citing *Bentley v. MacKay*, 31 Beav. 143 ; *Wycherley v. Wycherley*, 2 Eden. 175.

An examination of these cases makes it clear that if they can be considered as raising such a doubt, they certainly do not amount to decisions, and afford no ground for holding that the defendant can have any advantage from the fact that his violent language and threats were conveyed by Mrs. Godbold to her mother.

Mrs. Godbold joined in the deed to bar her dower, the conveyance to her mother having been made by Godbold without Mrs. Godbold joining to bar dower.

The fact of Mrs. Godbold being a debtor of the defendant puts her in a difficult position. I have found no case and no suggestion that a security obtained by a creditor from his debtor by the use of strong language such as is here set out, would be declared invalid. But in the deed in question the clause barring dower, and which contains a release and quit claim, so far as it is operative, is absolute and unconditional; and, as it stands, in no wise evidences the fact that the conveyance is a security, and not an unconditional transfer. The memorandum recognises in her no right to redeem. The real transaction therefore does not appear from the deed; and as it cannot, in my opinion, be supported as against Mrs. Sheard, I think it must be declared wholly invalid. Had I not so concluded, it would have been necessary to have imposed, as a condition of allowing it to stand against Mrs. Godbold, that the defendant execute a document evidencing the real transaction. This would, in effect, be providing for a new instrument to be executed by the parties to rectify an error which has arisen from the defendant having had his own interests looked after by a conveyancer and solicitor, while the plaintiffs were left without advice.

I think the plaintiff's motion must be made absolute, setting aside the judgment at the trial, and entering judgment for the plaintiffs, declaring the deed invalid.

The plaintiffs must have all their costs.

GALT, C.J., concurred.

[COMMON PLEAS DIVISION.]

O'SULLIVAN V. LAKE ET AL.

Valuator—Liability of—Misdirection.

The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee.

The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The Judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence.

Held [GALT, C.J., dissenting], this was misdirection.

It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The Judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the enquiry : " Why was not the original transaction carried out ? "

Held, per ROSE and MACMAHON, JJ., that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts.

K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from \$200 to \$300 per acre, but the Judge told the jury that K. was not in the land business, and had no knowledge of the value of the property.

Per ROSE, J.—The observations as to K. was a practical withdrawal of his evidence from the jury.

Per GALT, C.J.—There was evidence of negligence to go to the jury, particularly in defendant L. not making enquiries of others in the neighbourhood as to the value of the land.

A new trial was therefore directed.

THIS was an action brought to recover damages against the defendants for negligence in valuing a property on which the plaintiff proposed to lend a sum of money.

The action was tried before Cameron, C. J., and a jury, at Hamilton, at the Spring Assizes of 1887.

The learned Chief Justice dismissed the action against the other defendant ; and the jury found a verdict against Lake for \$3,000.

The facts of the case were briefly as follows: The plaintiff was desirous of investing a sum of \$8,000 on mortgage. A person resident in Hamilton applied for the loan, to be secured on property at or near Hamilton. The plaintiff declined to accept the valuation of any local valuator, but required the applicant to obtain a certificate of value by a local man, to be submitted to the defendant Lake. The applicant obtained a valuation from Balfour, the other defendant, which was sent by him to the defendant Lake.

Lake went to Hamilton, and on his return wrote the following letter to the plaintiff:

"I have personally examined the property mentioned in the accompanying letter of Mr. Peter Balfour, of Hamilton, in which he describes the property on which Mr. Murphy desires a loan of \$8,000. I am not sure of the measurements, but think them correct. The property is very nicely situated, and should Mr. Murphy live five years I think, with his energy and tact, he will make it very valuable. The whole property mentioned by Mr. Balfour is, in my opinion, fair value for \$13,500, and I think you could safely loan \$8,000 for say five years, \$1,000 payable say in one or two years, and the balance at the end of the term, with assignment of life policy for \$3,000, with the stipulation in case of death \$2,000 of it should go to reduce the mortgage. This ought to make all safe."

For this report he charged and was paid a fee of \$40.

The mortgagor made default in payment; and when the property was offered for sale it was found impossible to sell it for anything like the amount of the mortgage money.

In Easter Sittings, 1888, *Maclaren* obtained an order *nisi* to set aside the verdict entered against the defendant Lake, and to enter a verdict or judgment for him on the following grounds:

1. The said judgment is against law, evidence, and the weight of evidence. 2. The damages are excessive. 3. On the grounds taken by the defendants' counsel upon the motion for non-suit and on objections to the Judge's charge. 4. On the ground that the defendant was taken

by surprise, as is shewn by the affidavits. 5. On the discovery of new evidence, as is set forth in said affidavits, or why a new trial should not be granted.

During Michaelmas Sittings, 1887, *Robinson*, Q. C., and *Maclaren* supported the motion.

Osler, Q.C., also obtained an order *nisi* to set aside the judgment entered for the defendant Balfour, and to have judgment entered against him.

During the same Sittings, December 7, 1887, *Robinson*, Q.C., and *Maclaren* supported the motion, and referred to *French v. Skead*, 24 Gr. 179 ; *Gowan v. Paton*, 27 Gr. 48 ; *Scottish American Investment Co. v. Hope*, 26 Gr. 430, 434 note ; *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696 ; *Silverthorn v. Hunter*, 5 A. R. 137 ; *Hamilton Provident and Loan Society v. Bell*, 27 Gr. 203.

Osler, Q. C., shewed cause to the defendant Lake's motion, and supported the plaintiff's motion as to the defendant Balfour. He referred to *Canada Landed Credit Co. v. Thompson*, 8 O. R. 696.

C. Moss, Q.C., contra as to Balfour.

February 11, 1888. GALT, C. J.—There are two questions to be considered ; first, as to the question of negligence; and second, as to the responsibility of the defendant arising from his employment.

It was proved at the trial that the defendant held himself out as a valuator of property, and also that his business was confined principally to the city of Toronto. It was also proved that the plaintiff informed him that he was required to form an opinion not only on the valuation to be made by what is called a local man, but on his own personal inspection. He was examined fully before the jury as to the manner in which he had discharged his duty, and they found against him. The question was one for their consideration, and it cannot be said, on a review of the whole evidence, that their verdict was contrary to evidence or the weight of evidence.

Then as to the responsibility of the defendant, Mr. Robinson contended that this was a mere matter of opinion; and contended that this was the first case in which such an action had been brought, and that all that was complained of here was there is a mistake in judgment.

In the case of *Jenkins v. Betham*, 15 C. B. 168, Parke, B., before whom it was tried, in charging the jury said "that the action was of the first impression," and that he should, if necessary, reserve the question whether an action would lie by the plaintiff against a valuer or quasi arbitrator under the circumstances set forth in that case, which was an action against the defendant for an unskilful and negligent valuation of damages to be paid by the executors of a deceased rector to the incoming incumbent. The jury found a verdict in favor of the defendant. On a motion for a new trial the verdict was set aside, and a new trial ordered.

It is plain from the judgment of Jervis, C. J., that in that case there were two questions to be considered; first, as to the manner in which the defendants had actually discharged their duty; and, secondly, as to their ignorance of the principle of law on which they should have acted. The jury found in favor of the defendants as to the first question; but the Court was of opinion, as respects the second, that they were liable. In the present case there is no principle of law involved. The only question is, did the defendant neglect his duty, and the jury have found that he did.

There were several cases cited from our own Chancery Reports, which to a certain extent differ from each other; but the case of *Hamilton Provident and Loan Society v. Bell*, 29 Gr. 203, appears to me as decisive on this question. The headnote is: "The paid agent of a Loaning Society, who professed to be skilled, and had a knowledge in the valuing of lands, was held liable to the society for a loss sustained by them by reason of a false report of such agent." In giving judgment, Spragge, C., says, at p. 206: "I think, however, that this case may properly be decided as falling

within the principles applicable to cases of agency, and the possession or professed possession of knowledge and skill in the agent. In such cases it is not necessary to establish as against the agent fraud, or gross negligence, from which fraud may be inferred, as has been held to be necessary in other cases of untrue representation where the law casts no duty upon the person making the representation."

In this case the defendant was employed by the plaintiff to personally inspect and put a valuation on the property. He accepted the employment; but, according to the finding of the jury, he was guilty of negligence in the discharge of the duty which he had undertaken, and for which he was paid, and by reason whereof the plaintiff had sustained serious loss.

As respects the affidavits, they only shew that other persons since the trial have done what the defendant ought to have done, namely, that they have examined the quality of the land. There was, however, one point to which the learned Chief Justice referred in his charge, namely, that no enquiry was made by the defendants as to the saleable value of land in that locality, and this was certainly a matter to which his attention should have been directed, and no allusion is made to it in the affidavits. I confess it appears to me to have been a very great neglect of duty on the part of the defendant that he, according to his own statement, as quoted by the Chief Justice, "made no enquiry of any person as to the value of land in that neighborhood: that he took Mr. Balfour's valuation; and taking that, and looking at the land himself, he made the valuation of \$13,500."

I cannot understand how a valuator, who is personally ignorant of the saleable value of property, can be acquitted of negligence if when he is employed to make a valuation with a view to the loaning of a considerable sum of money, neglects to institute any enquiry on that most important subject.

In my opinion this rule must be discharged, with costs.

There was a notice of motion on the part of the plaintiff against the defendant Balfour. Moss, Q. C., appeared for him. The motion must be discharged, with costs.

ROSE, J.—It will be necessary first to determine the duty or obligation cast upon a paid valuator of land.

It may be stated in the words of Spragge, C. J. O., in *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696, at p. 700, as: "The duty of the exercise of due diligence and of knowledge and skill;" or, to adopt the language of Sir William Jones,—Bailments, p. 98—: "As bound still more strongly than if he were a mere mandatory to use a degree of diligence adequate to the performance of it," the duty.

The statement of claim charges that the defendants either "falsely and fraudulently represented the value of the said land to be \$13,500 when in fact it was and is only worth about \$5,000; or made a representation whereby the plaintiff was induced to loan the money as aforesaid when they, the said defendants, were ignorant of the value of the land, which amounts, as plaintiff submits, to fraud against the plaintiff."

The late learned Chief Justice directed the jury as follows: "But a valuator is a person who holds himself out to value property, assumes to have skill and knowledge in that matter, and is bound to use that skill and knowledge reasonably in the interest of his client. If he does anything rash, without obtaining the necessary information to enable him to make a just valuation, and the person who employed him is injured by it, that gives him a cause of action. In that view of it I think there is evidence for your consideration as against the defendant Lake."

Later on the learned Judge said: "If it was not fair value for \$8,000, did Mr. Lake discharge his duty fairly as a valuator by merely taking the valuation of Mr. Balfour, who was acting on behalf of Mr. Murphy, the borrower, and then going to the land and looking over it, and making no enquiry from any body as to the value of that land, what it would sell for? He says in the course of his

examination, which was read here, that he made no enquiry of any person as to the value of the land in that neighborhood. That he took Mr. Balfour's valuation, and taking that, and looking at the land himself, he made the valuation of \$13,500."

Again the jury were directed: "Did the defendant take reasonable care? Did he exercise that caution that ought to have been exercised by a man assuming to discharge the duty of a valuator who was to receive compensation for the same? There is no evidence here, no indication given, that Mr. Lake acted intentionally dishonestly in this matter."

The direction of the learned Chief Justice is challenged as laying down the duty of a paid valuator to obtain the opinions of others in order to free himself from the charge of negligence.

The defendant Balfour had carefully examined the property and sent in a detailed description of it, valuing it at \$13,500. The plaintiff, not content to rely upon the opinion of a local valuator, employed Mr. Lake of Toronto to go to Hamilton, and report, as he says, first, on the reliability of Mr. Balfour; and second, to value the property. The defendant Lake says that he did not understand that he was to report as to Mr. Balfour. As a matter of fact he did not; and so the plaintiff could not have been misled in that respect. Moreover the plaintiff made his own enquiries as to Balfour, and formed a favorable opinion of him. Lake, however, well knew that his own opinion or valuation was desired, and would be acted upon; and he says he honestly gave his own opinion.

I think it cannot be doubted that Lake's duty was to go to Hamilton, examine the property, ascertain all the facts which should enter into the formation of an opinion or valuation, such as the character of the building, the nature of the soil, the uses to which the property might be put, the roads affording means of communication with the city and surrounding country, the character of the property adjoining, the character of the neighborhood, and many

other things that might be suggested; but, especially in view of the fact of his being an outside man, it seems to me it was his duty to ascertain the fact as to what sales, if any, of land had taken place in the vicinity, and the prices realized; but I cannot think that it can be laid down as a duty that he should have asked the opinion of others as to values, or, as put by the learned Chief Justice, "what it would sell for."

In the examination referred to, Lake was pressed as to whether he did not think he should have made "enquiries as to the values of surrounding properties." If by this is meant the prices realized at sales which had taken place, it seems to me clear that he should; but if it was intended that he should have gathered the opinions of others, I cannot agree that such was his duty.

If he was to make such enquiries, of whom was he to make them? His own opinion was desired, not the opinions of others. If he was to gather opinions there would be negligence if he did not ascertain the fitness of those whose opinions he sought?

In this very case when Lake put in the witness box Mr. Kerr, an old and admittedly respectable citizen, who ventured the opinion that his land adjoining was worth from \$260 to \$300 per acre, his evidence is disposed of by the learned Chief Justice with the observation that he did not profess to be in the land business, and that he had no knowledge of the value of property. Had Lake obtained his opinion in advance would it have availed in answer to the charge of negligence; and if Kerr's opinion is to be held valueless, would any given number of such opinions have proved to be of any value?

If there had been no negligence in ascertaining facts, I am clear there could be no charge of negligence in obtaining opinions. I am further of the opinion that had he gone about gathering opinions from others and acted upon them, he would have been blameworthy and guilty of negligence. In view of all the opinions offered at the trial the learned Chief Justice directed the jury that the value must be to

some extent problematical. The contract by Lake was to give his own opinion on facts, the knowledge of which was to be acquired by due diligence. I think this objection to the charge well taken.

I think that the observation to the jury as to Kerr's evidence was practically a withdrawal of his evidence from the jury. Although the fact that Kerr deposed he did "not know of any sales in that locality for a long time"—that to his knowledge there had not been any except Murphy's purchase—was a fact that properly formed the subject of comment as weakening the strength or value of his testimony; but he had resided on the adjoining property since 1854, was a man of intelligence, and professed to know the value of property in the locality, and so his evidence should have been left to the jury for their consideration; and they should not, in my opinion, have been told that he had no knowledge of the value of property. I do not find that this was specifically objected to; and therefore this alone would not enable us to interfere.

I am unable to understand the result of the charge as to the application to the North American Life Insurance Company.

As I have above pointed out the jury were directed that there was "no evidence," "no indication" that Lake had acted with intentional dishonesty; and yet the fact that the loan did not go through was pressed upon their notice with the enquiry "why was not the original transaction carried out?"

I think it best to give the exact words of the charge.

"Then reference is made to Mr. Lake having visited the property before. You will remember that Mr. McCabe, the manager of the insurance company in Toronto, was applied to by Mr. Murphy to get a loan of \$8,000, and Mr. McCabe came up to see the property. Mr. Lake, who is one of the managers or directors of the company, was in Hamilton at the time, and Mr. McCabe called upon him, and asked him to go with him to the property. The loan did not go any further. Mr. McCabe says he does not know why. He is under the impression the borrower was at fault. it did not go further anyway; he would not undertake to put a value upon it. On the part of the plaintiff it is said that Mr. Lake was aware that loan did not go through. Mr. Lake is the person who makes the

valuation for Mr. O'Sullivan shortly afterwards, to see if there was security in the property for the same sum of \$8,000 ; and he goes into it with Mr. Murphy again. Why wasn't the original transaction carried out? Mr. McCabe says the proposal to the insurance company was to borrow \$8,000, \$6,000 at six per cent., and \$2,000 at seven per cent. for two years. That is giving a higher sum for that ; and a policy of life insurance was to be given as collateral security. These are circumstances for you to consider. Mr. Lake, as a director of the Insurance Company, was aware of the application for that loan, and that it did not go through. Then he makes the valuation for Mr. O'Sullivan for a loan of a similar amount. There is this difference, that whereas in the case of the insurance company the interest would have had to be paid half yearly, in this loan Mr. Murphy got the benefit of the interest only falling due at the end of each year. It is to the interest of the lender to have the interest half yearly ; it is to the interest of the borrower to have the interest payable yearly."

Now what is the fair result of these observations? Is it not that there was something suspicious about Lake's conduct when he as a director of the insurance company valued this property, knew that for some reason the loan did not go through, and then as a valuator of the plaintiff advised the loan? As a matter of fact the impression of Mr. McCabe that Murphy did not proceed with the loan turns out by affidavit now filed to have been correct; and the suggestion as to the mysterious conduct of Lake was without foundation in fact, and must have caused a feeling against him in the minds of the jury. Lake's explanation as to not having evidence to explain the transaction is, that the plaintiff in his examination having freed him from all imputations of wrong doing, he was taken quite by surprise when at the trial this was pressed.

The defendant Lake, in the affidavits filed on this motion, states that owing to the plaintiff having stated on his examination that he did not object to the description of the property, he was taken by surprise by the evidence as to the depth of soil ; and now files affidavits to shew that the soil is of an average depth, far exceeding that stated by the witnesses at the trial. It is not quite clear that from the course of the attack the defence should not have anticipated the necessity of meeting this evidence ; and the trial extended over Sunday, having been adjourned

from Saturday afternoon until Monday morning 10 o'clock, during which time it would seem that the evidence might have been procured.

On the whole it seems to me that the fact that Lake did not make enquiries as to previous sales affords evidence to go to the jury of negligence, which could be answered only by shewing that such enquiries, if they had been made, would, or should, not have altered the result. The statement by Kerr, on examination at the trial, that there have been sales since October, 1854, "very cheap" shews the necessity for further evidence on this point, if Lake is to be freed from the charge of negligence.

I am further of the opinion that if the jury believe that the land was at the time of valuation worth not more than say \$4,000 or \$5,000, the fact that it was then valued at \$13,500 could not be withdrawn from them, as it would afford some evidence of either want of skill or knowledge which might support a charge and finding of negligence.

Of course the jury have the right to consider whether what Lake did in examining the property was sufficient to give him all necessary information upon which to furnish an opinion.

Had there been nothing further I should have thought the verdict could not have been disturbed.

But it seems to me there was error in the charge in directing the jury that the fact that he did not obtain the opinion of others as to values was evidence of negligence.

2. The observations as to the evidence of Kerr was a practical withdrawal of it from the jury.

3. The observations as to the application to the North American Life tended to create a prejudice in the minds of the jury which was not warranted by the facts.

I therefore think as to Lake there must be a new trial, with costs to the successful party in the cause.

As to Balfour I agree that neither contract nor fraud has been shewn, and that the judgment in his favour must stand, and the motion against him be dismissed, with costs.

MACMAHON, J.—The obligation cast upon a paid valuator of land was fully considered in *Hamilton Provident and Loan Society v. Bell*, 29 Gr. 203, and *Canada Landed Credit Co. v. Thompson*, 8 A. R. 696, the latter of which has been referred to in the judgments of his lordship the Chief Justice and my brother Rose.

The plaintiff, desiring to obtain valuation of property near Hamilton on the security of which he had been asked to advance \$8,000, employed the defendant, a land valuator in Toronto to make an examination, and give a valuation of the property.

Murphy, the proposed borrower, had about this time procured a valuation to be made by a Mr. Balfour, a land agent of Hamilton, whose valuation dated 1st November, 1882, was \$13,500. This valuation was addressed to the defendant.

The defendant Lake visited the property; and, on 7th November, wrote the plaintiff enclosing Balfour's valuation, and saying that he had personally examined the property mentioned therein, and stating that in his opinion the property was fair value for \$13,500, and that he thought plaintiff could safely loan \$8,000 upon it.

On the strength of this valuation the plaintiff lent \$8,000 on mortgage to Murphy.

The mortgage money having fallen into arrear the property was advertised and put up for sale by auction when the highest bid made was \$3,000, and the property was withdrawn. The plaintiff then brought his action against the defendants for negligence in not exercising due diligence and skill in making his examination and valuation.

Sometime prior to the valuation being made by defendant Lake for the plaintiff, Murphy had applied to the North American Life Assurance Company for a loan for the same amount, \$8,000. The defendant Lake, who was interested in the Life Association as a stockholder and director, accompanied Mr. McCabe, the manager of the company, when a joint inspection was made of the property. There was no report as to valuation made by the defendant Lake on that

occasion; but Mr. McCabe stated in his evidence that the proposed loan was dropped by Murphy. And by an affidavit made by J. B. Carlile, the then manager of the North American Life Assurance Company, filed on this motion, he says that he urged Murphy to prosecute the application for the loan, but he declined because he thought he would get the money at a less rate of interest. Mr. Carlile in his affidavit also stated he considered the property adequate security for \$8,000.

The late learned Chief Justice in his charge to the jury dwells on the fact of Murphy having made the application to the life assurance company, and as to McCabe and Lake's visit to the property for the purpose of making a valuation, and that Mr. Lake as a director of the life assurance company was aware of the application for that loan, and that it did not go through; then he makes the valuation for the plaintiff for a loan of a similar amount.

The inference that the jury might have drawn, and perhaps did draw, was that Lake knew the life assurance company had refused the loan, and yet advised the plaintiff to advance the \$8,000 on mortgage.

The plaintiff was relying upon the defendant Lake's skill and knowledge as a valuator; and he was entitled to receive from him as a paid valuator all the care, skill and judgment which he could employ in the service he had undertaken. The plaintiff was not desiring, nor was the defendant Lake retained to get, the opinions of others as to the value of the property. Had the plaintiff been content with going out and making an examination and survey of the property, and then obtained the opinions of others as to its value, and reported to the plaintiff, on the strength of the the opinions thus obtained, and upon the report thus made, the plaintiff had acted and so suffered loss, I think the defendant Lake might fairly have been considered liable for the loss; for he had not acted upon his own judgment, and it was for the exercise of that for which the plaintiff retained and paid him.

I think a valuator is bound to ascertain what sales have been made of lands in the locality, and the prices at which sales have been effected; and, if there have been no sales, and property has not changed hands in that locality for a lengthened period, to enquire and ascertain the cause, as it may be the neighbourhood is objectionable, or for some other reason property is unsaleable. For buildings on property may be expensive to erect, and valuing them as buildings without regard to the saleable character of the property in the locality, may prove most deceptive to an intended investor on mortgage who requires to rely on the property commanding a ready sale.

If property is not likely to be sought after, the fact of expensive buildings being erected upon it may prove of little advantage to a mortgage investor whose object is to be in a position to realize on his security at any time upon default having been made in payment.

I agree that the judgment in favor of the defendant Balfour cannot be disturbed, and the motion as to him is dismissed, with costs.

I agree with my brother Rose that as to the defendant Lake there must be a new trial, costs to the successful party in the cause.

[COMMON PLEAS DIVISION.]

PRIESTMAN V. BRADSTREET.

Master and servant—Dismissal—Speculating in stock and grain exchanges through “bucket shops”—Judgment where jury disagree—O.J.A. Rule 321.

The defendants carried on the business of a commercial agency, of which the plaintiff was general manager, having oversight over the employees, and command of a large amount of money passing through his hands. By the terms of his management plaintiff was to be paid a salary of \$5,000, and was to devote his whole time, influence, and talents to the successful prosecution of the business, the failure of either party to keep the agreement rendering it void. The plaintiff having engaged in speculating in margins in the stock and grain exchange, through brokers and “bucket shops,” had sunk all his private means, and had become indebted to a large extent beyond his ability to pay. It appeared also that he had engaged in some of such speculation with various merchants, whose ratings he had not altered, although in his judgment transactions of that nature, materially affected the credit of those engaging in them. Having been requested by defendants to give up speculating, he refused to do so stating that if his so doing was a condition of his remaining he would dissolve the connection—whereupon he was dismissed.

Held, that his dismissal was justifiable.

THIS was an action for wrongful dismissal, tried at Toronto, before Galt, J., and a jury, at the Autumn Assizes, 1887, when the jury disagreed. The plaintiff was the general manager of the defendants’ business at Toronto and Montreal, at a salary of \$5,000 per annum.

Under the agreement the plaintiff was “to devote his whole time, influence, and talents, during business hours, to the successful prosecution of the business,” * * and “conform to the established rules of their office.” The agreement further provided, “that the failure of either party to keep the terms of this agreement shall make it null and void;” and that it might “be dissolved by either party giving written notice to the other, three months prior to the termination of each current year.”

The business was that of a commercial agency.

In his evidence the plaintiff said that the business “required very considerable discretion, energy, tact, and ability.”

The defendants' complaint was, that the plaintiff had given his attention to the business of an organ factory and of a carpet factory; and also in having engaged in "speculating on margins" on the stock and grain exchanges through the brokers, and what were called "bucket shops," and that he refused to give up such transactions.

The plaintiff was dismissed without notice; and the dismissal was sought to be justified on the ground, stated in the language of the letter of dismissal, "that your other interests have so engaged your time and attention; have so completely diverted your thoughts, and so thoroughly weaned you from your allegiance to the interests of this company, that it would be difficult, if not impossible, for you to re-enlist your energies to the extent necessary to making your duties acceptable or satisfactory to us."

The letter was dated at New York, on the 30th of December, 1886.

The plaintiff's services were dispensed with from the 1st of January, up to which time he was paid his salary.

The defendants called no witnesses.

The other facts appear in the judgment.

In Michaelmas Sittings, 1887, *Osler*, Q.C., for defendants, moved to enter judgment for them, and referred to *Pearce v. Foster*, 17 Q. B. D. 536; *Smith's Master and Servant*, Blackstone ed., secs. 193, 194.

Ritchie, Q.C., contra, referred to *Wood* on Master and Servant, 2nd ed., 239; *McGrath v. Bell*, 33 N. Y. Sup. Ct. 195; *Smith's Master and Servant*, pp. 145, 149.

March 10, 1888. ROSE, J.—I have carefully read the evidence, and am clearly of the opinion that there is nothing in the evidence as to the plaintiff's giving attention to the business of the organ factory or the carpet factory to warrant us in granting the motion.

The remaining question for consideration is, whether the plaintiff having engaged in "speculating on margins" on

the stock and grain exchanges through brokers, and what are called "bucket shops," and refusing to agree to give up such transactions, justified his dismissal.

He had been so speculating for many years; had sunk all his private means, his losses amounted to about \$50,000, and he was indebted to the extent of some \$12,000 to \$15,000 beyond his ability to pay.

The plaintiff testified that in discharging the duties of his office, the rating of the various merchants depended upon his judgment: that if he found that a merchant was "putting up money on margin in wheat in Chicago," he would lower his rating: that "the risk he would run has an effect on his business, possibly it might affect him in attending to the details of his business:" that it would materially affect his credit: that while he, the plaintiff, was sitting in judgment on such transactions, he was in them himself "up to the neck," as it was expressed.

He further stated that he had been engaged with such men in these transactions, and had not altered their ratings, "because probably the man's financial position justified all he had in the rating and probably more."

That he had himself made default in payment of his losses; had been "posted" in the stock exchange, though improperly, as he was not a member; had suits brought against him in respect to the transactions, which, however, had been dropped: that complaints had been made to the head office by the parties interested: that the rival concern of Dun, Wiman & Co. had made capital out of his being "posted:" that he was engaged up to the date of the trial in similar transactions, limited because of his limited means; and had declined, at the request of the head office, to cease from such speculation.

In December, 1886, at a meeting in New York, between himself and Mr. Clark, president of the company, appointed to see if the difficulties might not be adjusted, he says he told him (he the plaintiff) was "interested in wheat in Chicago," and that he would not "be bound" to "quit that kind of work."

In answer to questions, he said that at such interview, he insisted on his right to do as he pleased as to that, and offered the president the alternative of his (the plaintiff) leaving the company, or not having this request pressed: that if it was to be made a condition of his remaining with the company, that he was to cease speculating, he would dissolve his connection with the company.

“Q. If it came to the question of you retaining your salary of \$5,000 a year or giving up speculation, you proposed to give up your salary? A. I did sir.” * * “That was my mind at the time of the interview, and I had no reason to change it at all.”

It thus comes down to a question whether on these facts the company was or was not justified in dismissing the plaintiff for refusing to cease from such speculations.

In *Pearce v. Foster*, 17 Q. B. D. 536, it was held that upon the defendants, merchants, learning that the plaintiff, a clerk in their employ, had for many years been engaged in speculating in “differences” upon the stock exchange to the extent of many hundreds of thousands of pounds, were justified in dismissing him from their service, the parties being under an agreement for a period of ten years.

Lord Esher, M. R., puts it upon the ground that such conduct was wholly incompatible with the due and proper discharge of his duty to his master.

It seems to me that this case is a much stronger one for the defence; and, even without the assistance of the above authority, it would be impossible to hold, on the facts above stated, that the plaintiff had a right, not only to have forgiven his past misconduct, but also to insist upon his right to continue his dealings.

He was not only entrusted with the duties above referred to, but also had oversight over the employees of the company; was entrusted with a power of attorney enabling him to have command of all the funds of the company passing through his hands, amounting to many thousands a year, and the success of the company depended upon his upright and faithful discharge of duty. It is only

fair to say, that, apart from these transactions, in my opinion, his conduct appears in a favourable light; and I am further bound to say that I do not remember reading evidence which impressed me more strongly with the candour and truthfulness of the witness.

I think that when he gave the president the option of not requiring him to cease from further speculations or of parting company, the president really had no option, as his duty to his company rendered it imperative that he should release him from further service.

It would be an idle form to allow this case to go to a jury, even if technically the plaintiff has the right to ask to have submitted to them the question as to whether such conduct was or was not incompatible with the proper discharge of the plaintiff's duties; for, in my opinion, no finding to the contrary could be allowed to stand.

This case is, as it seems to me, one of the few in which the powers conferred upon the Court, under rule 321, O. J. A., may be exercised, if it is necessary to invoke the aid of such rule for the order we are about to make.

For cases under this rule, see *MacLennan's* Judicature Acts, 2nd ed., p. 434. Reference may also be had to *Sewell v. British Columbia Towing, &c., Co.*, 9 S. C. R. 527, pp. 551-2. See also *Toulmin v. Millar*, 12 App. Cas. 746, where doubt is thrown upon the decision of the Court of Appeal, reported in 17 Q. B. D. 603.

I see no evidence of waiver to go to the jury, as pressed by Mr. Ritchie. The company never assented to his right to continue such dealings, even if it is open to the plaintiff to contend that it might be found to have condoned past misconduct.

I think the motion must be made absolute to enter judgment for the defendant-company, dismissing the plaintiff's action, with costs.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

ANDERSON V. STEVENSON.

Landlord and tenant—Postponing lease to mortgage—Effect of—Priority over subsequent mortgages—Covenants for quiet enjoyment; and to renew—Damages—Lien over subsequent mortgages.

A., the owner of certain lands, executed a lease under the Short Forms Act to the plaintiff and two others for twenty years, which was registered. The lessees covenanted to plant the premises with fruit trees, and keep the premises during the term as an orchard. The lessor covenanted for quiet enjoyment; and that if during the term the premises were for sale, the lessees should have the refusal, and if the lessees could not on the expiration of the term get a renewal, they were to be allowed a fair valuation for the orchard and improvements. The lessees went into possession and planted the fruit trees. Afterwards to enable the lessor to procure a loan from an investment company, the lessees entered into an agreement, which was registered, to postpone their lease to a mortgage to the company, so that the mortgage would be a first and prior incumbrance on said lands, and in default of the payment of the mortgage money, the lease was to be forfeited and void; and the company might, without any notice, etc., enter and hold said lands freed from the lease, etc. The lessor then executed two other mortgages to different mortgagees on the property, which were past due at the commencement of this action. The lessor subsequently and during the continuance of the lease made default in payment of the mortgage to the company, who sold the land, and after satisfying their mortgage, paid the balance of the purchase money into Court.

Held, by ROBERTSON, J., and affirmed by the Divisional Court (GALT, C. J., dissenting), that by the agreement postponing the lease to the company's mortgage the lessees were placed in no worse position than if the mortgage had been made prior thereto, so that the lessees merely held subject to the mortgage, and the subsequent mortgagees to the lease; and that the lessees were entitled to damages for breach of the covenant for quiet enjoyment.

Per ROBERTSON, J., also. The lessees were entitled to damages for breach of the covenant for renewal; and *semble* such covenant did not run with the land.

Held, also, by the Divisional Court, in this reversing the judgment of ROBERTSON, J. (GALT, C. J., dissenting), that the plaintiff having an estate in the land had a claim on the fund in Court prior to the subsequent mortgagees, and was entitled to a declaration for payment out of the value of her interest in the unexpired term, namely, one-third of the net annual value or profit which would have been derived therefrom had the lessees been permitted to remain on the land during the term, and that such value must be computed with reference to the agreement that on non-renewal the lessees were to get the value of the trees and improvements; and in such view it was not necessary to consider the question of the breach of the covenant to renew.

THIS was an action for an account of improvements made on lands leased to the plaintiff; and for damages for breach of a covenant for quiet enjoyment; and for an order

directing certain moneys in Court under the Imperial Act 10 & 11 Vic. ch. 96, to be paid out to the plaintiff on account of said damages, &c.

The defence of the defendant Stevenson was, that he was a second mortgagee of the lands, and that he was entitled to the said moneys, &c., prior to any claim of the plaintiff.

The action was tried before Robertson, J., at the Autumn Chancery Sittings, at Toronto, 1887.

The facts were not in dispute. One Eliza Cherboth Anderson, being the owner in fee of lot 22 in 7th concession North Gwillimbury, on 1st October, 1874, made a lease "in pursuance of the Act respecting short forms of leases," of a portion of the said lot to the plaintiff, and two other persons (who were not parties to the action) for the term of twenty years. Among other stipulations in the lease to be observed by the lessees was one: "That they will plant the premises with fruit trees, and keep the premises as an orchard during the term hereby granted." There was a covenant by the lessor for quiet enjoyment; and a further covenant, that "if the premises shall be for sale during the said term, the said parties of the second part are to have the refusal." "And if when the term hereby granted shall have expired, if impossible to get a renewal, the said parties of the second part are to be allowed a fair valuation for orchard and improvements."

The lessees went into possession under the lease, and the plaintiff Alexander Anderson at once planted the premises with apple trees of the highest grade, which were in a flourishing condition, and would come to maturity in 1878.

On 17th July, 1878, the lessor being desirous of obtaining a loan from the London and Ontario Investment Company, the lessees, at the request of and for the accommodation of the lessor, entered into an agreement with the company, which after reciting the mortgage and the lease, set forth that, in consideration of the premises, and of one dollar then paid by the company to the parties

of the first part (the lessees,) "they, the said parties of the first part, do and each of them for himself and herself, hereby consent and agree with the said company, their successors and assigns, that the said lease and term of years hereby created, and all right, title and interest whatever of the said parties of the first part, and each of them and their heirs," &c., "granted or created thereby, shall be postponed to the said mortgage and title of the said company thereunder, so that the said mortgage shall be the first and prior incumbrance upon the said lands; and that in default of payment of the moneys secured by the said mortgage, or any part thereof, the said demise shall become forfeited and void; and the said company their successors, and assigns, may, without any notice to or demand upon the said parties of the first part * * enter upon and hold the said leasehold lands freed and discharged from the said term of years, and all and every the estate, right, title and interest whatsoever of the parties of the first part."

After this agreement was made and registered the lessor died; and, default having been made in payment of the mortgage money, the property was sold, and the balance of the purchase money \$2,227 paid into Court under the Imperial Act 10 & 11 Vic. ch. 96; and it still remained there.

The plaintiff received no return from her outlay from the said orchard, the defendant, Arthur T. Anderson, having occupied the premises since the commencement of the term.

The lessor also granted a second mortgage on the said lot 22, bearing date 19th October, 1880, to secure the payment of the sum of \$1,257, to the defendant Stevenson, with interest at 8 per cent., which was past due. And also granted to one William Fry, another mortgage on the same premises, to secure the payment of the sum of \$350 and interest, bearing date 12th January, 1881.

By deeds of surrender and release, bearing date respectively, the 13th and 14th days of March, 1887, two of the

lessees, Arthur T. Anderson and Alexander Anderson, assigned, released, surrendered and yielded up unto the mortgagees, Stevenson (one of the defendants) and Fry all their respective rights, titles and interest in and to the residue of the term, and to the demised premises, and to the said money paid into Court, so that the only interest in the money in Court, as against these mortgagees, was the one undivided third part of the plaintiff, if she had any interest therein.

The plaintiff then brought this action, and claimed to have the amount in Court paid out to her as part compensation for the loss of the premises; and a further sum as damages against the estate of the deceased for the loss of her leasehold interest.

The defendant Stevenson claimed that he was entitled to have the surplus of these moneys, or so much thereof as might be necessary for such purpose, applied to the payment of the moneys due to him under his mortgage; and that, according to the legal effect of the lease and the agreement to postpone their claim by the lessees to the company's mortgage, and his mortgage from the testatrix, the plaintiff was not entitled to have her claim satisfied out of the said moneys in priority to his claim.

The other defendants admitted that they were executors of the will of the testatrix; but were not in a position to say whether there were assets belonging to the estate (as the principal asset was in Court in England and had not been paid over to them) sufficient to pay all her debts in full. And they submitted, as to any claim made by plaintiff against defendants as executors, their rights to the Court, &c.

It was contended by counsel for the defendants, that the plaintiff was premature in bringing her action, so far as the improvements for which the lessees were to be entitled; that she and her co-lessees were only to be remunerated for the orchard and improvements in case "*it should be impossible to get a renewal of the term*" after the expiration of the twenty years, and as that would not expire until 1894, it was impossible to say whether a renewal could be

got or not. Also that as the covenant for compensation was not one of those given in the statute R. S. O. ch. 103, schedule B., column one, it was a personal one, and did not extend to assigns, &c., they not being named therein; nor did it run with the land. Also that the plaintiff gave up her right, when she, with the other lessees, agreed to postpone their claims under the lease until after the mortgage to the London and Ontario Investment Company was satisfied, and thereby the term, by reason of the subsequent default in payment of the mortgage, was put an end to; and she could not claim title to any of the money in Court in priority to defendant Stevenson, as a subsequent mortgagee.

The learned Judge reserved his decision, and afterwards delivered the following judgment:

ROBERTSON, J.—I cannot see that the plaintiff is in a worse position than she would have been had the mortgage to the London and Ontario Investment Company been given prior to the lease. She would then, with her co-lessees, hold subject to that mortgage, and any subsequent mortgagee would hold subject again to the lease. The covenant for quiet enjoyment would surely, in that case, hold good, and any breach of it would entitle the lessees to damages.

Now there was a breach, by reason of a default of the lessor in making payment of her mortgage to the London and Ontario Investment Company; it was her duty to pay off that mortgage, or, in case of her death, her executors should have done so, and thereby prevent the possession of the premises by the plaintiff and her co-lessees on their lease being disturbed. Allowing default on the second and third mortgage would not so affect the lessees, because they took with full notice of the lease and subject to it, so all they could do would be to require the tenants to pay the amount to them in reduction of their mortgage debt. The lessees' possession could not be disturbed, so long as they performed the covenants on their part in the lease.

So far then as the covenant for quiet enjoyment is concerned, a breach having been admitted, I think the plaintiff is entitled to recover whatever damages she may be able to prove by reason thereof; and it must be referred to the Master to make enquiries and to report.

As regards the plaintiff's right to recover compensation for improvements, &c., by reason of its having become impossible to obtain a renewal of the term, as provided by the lease, it is objected that this covenant or proviso is not contained in column one of schedule B. of the statute (R. S. O. ch. 103); it is only a personal covenant, and does not come within that class of covenants which run with the land, &c.

As I understand the plaintiff's contention she does not claim that this covenant is binding on the lessor's assignees; but she does contend that she or her legal representatives, (though not her assignees) are responsible; and that, therefore, her estate is liable to make good any loss by reason of the plaintiff, through the lessor's default or misconduct, suffering damages. And the plaintiff has sued her executors with a view of recovering from them as such; and she contends that as the sum now in Court was and is the proceeds of land, which was in part leased to her and her co-lessees, she is entitled to be paid for the value of these improvements, as far as that fund will go, out of it; and hold any balance over against any assets which may hereafter come to the hands of the executors to be administered; and further that inasmuch as this right arises on a covenant, prior to the covenant contained in the mortgage of defendant Stevenson, her claim on it should therefore have priority to that mortgage, in so far as the moneys in Court are concerned.

In my judgment it does not make any difference whether this covenant runs with the land or not; although I am of opinion that it does not. The rule in *Spencer's Case*, 1 Sm. L. C., 9th ed., 65, is very plain. Here the covenant extends to a thing which is not in being at the time of the demise made, and therefore can not be appurtenant or annexed to the thing which hath existence. As said in the first resolution in *Spencer's Case*, 1 Sm. L. C., at p. 66: "The covenant con-

cerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, *and not the assignee*, for the law will not annex the covenant to a thing which hath no being."

Here trees, which were not on the premises at the time of the demise, were to be set out for the purpose of creating an orchard. That orchard was not, therefore, at the time of the demise *in esse*; and, therefore, the word assigns, not being in the covenant, it does not attach to or run with the land on which the orchard was to be planted. But, supposing it did, I do not see that that would help the plaintiff, as against the subsequent mortgagee, for he is entitled to look to the land itself for the money secured by the mortgages, whereas the plaintiff has no such rights; but she has a right of action against the executor of the covenantor, for breach of the covenant, in the same way as she would have for a breach of any other personal covenant; and I therefore refer it to the Master to make enquiries as to the damages suffered by the plaintiff by reason of this breach; because I hold it a breach, to deprive the plaintiff of the right of renewal, which was done when the lessor or her executors suffered the land to be sold and the term put an end to by reason thereof under the mortgage to the London and Ontario Loan Company. But I do not think the plaintiff has any special claim on the moneys in Court; on the contrary the defendant Stevenson has as subsequent mortgagee; and I order the same accordingly. Further directions and costs will be reserved until after the Master has made his report.

In Michaelmas Sittings, 1887, *H. J. Scott*, Q. C., moved on notice by way of appeal against so much of the judgment as refused the plaintiff a lien on the moneys in Court; and *James Reeve* moved, also on notice, a cross-motion to have the judgment entered for the defendants.

During Hilary Sittings, March 8th, 1888, *H. J. Scott*, Q. C., supported his motion, and shewed cause to the de-

fendants. He referred to *Elphinstone, Norton and Clark* on Deeds, p. 137 and cases there cited; *Cripps' Law of Compensation*, 2nd ed., p. 100, *et seq*; *Spencer's Case*, 1 Sm. L. C., 9th ed., 65; *Berrie v. Woods*, 12 O. R. 693; *Ambrose v. Fraser*, 12 O. R. 459.

James Reeve, contra, referred to *Woodfall* on L. & T., 13th ed., 162, 674, 676; *Emmett v. Quinn*, 7 A. R. 306.

March 10. GALT, C. J.—After the evidence had been given (it is documentary) the learned Judge gave a judgment by which he held that the plaintiff was entitled to judgment against the estate, but not as against the money paid into Court, to which he held the subsequent mortgagees were entitled.

The learned Judge treated the case as follows:—After setting out the granting of the lease, the mortgage and the agreement. "I cannot see that the plaintiff is in a worse position than she would have been had the mortgage to the London and Ontario Investment Company, been given prior the lease. She would then, with her co-lessees, hold, subject to that mortgage, and any subsequent mortgagee would hold subject again to the lease. The covenant for quiet enjoyment would surely in that case hold good, and any breach of it would entitle the lessee to damages. Now there was a breach by reason of default of the lessor in making payment of her mortgage to the London and Ontario Investment Company."

With great respect, I think the circumstances of the case are different. The lessees were not in the position of lessees after a mortgage had been given; they had a prior right, and their agreement (to which the lessor was not a party) was with the company, and it was under that agreement their lease terminated. There was no breach of covenant on the part of the lessor; the injury which the plaintiff sustained was the result of her own act.

There are other questions in the action as to claims of subsequent mortgagees; but they do not affect the right of the plaintiff as between her and the defendants, who are the executors of the lessor.

I think that the motion of Mr. Reeve must be sustained, and judgment entered for defendants; but there should be no costs.

ROSE, J.—The fact being that the agreement between the lessees and the mortgagees, the London and Ontario Investment Co., was entered into at and for the accommodation of the lessor—as alleged and admitted by the pleadings, and as found by my learned brother Robertson—I agree to the conclusion he arrived at, namely, that its effect was merely to postpone the lease to the mortgage.

Thus it is recited in the agreement; and I think we should be careful to confine the subsequent language of the agreement by the recital.

The simple meaning of postponing, is of course apparent;—to place after, *i. e.*, in this case to place the lease after the mortgage.

To adapt language used by Mr. Justice Patterson in *Martindale v. Clarkson*, 6 A. R. 1, at p. 5. “There being no design in what was done by the lessees to benefit the lessor at their expense, farther than by enabling her to deal on more advantageous terms with the mortgagees, it would not appear to be unjust in the Court to declare that the effect of such agreement should be in law what the parties really understood when they made it.”

Can it be supposed that when the lessees at the lessor's request agreed to postpone their lease to the mortgage, they intended to put themselves in any worse position than if the lease had originally been made after the mortgage?

Must it not, in all fairness, be held that by agreement between the parties to the lease the covenant for quiet enjoyment should, after the date of the agreement, be taken to speak with reference and apply to the altered condition of affairs; and must not the Court now hold that it would be inequitable to allow the lessor, or those representing her to set up the consent of the lessees to the postponement of the mortgage as a consent that the lessor—mortgagor—might neglect or refuse to pay the mortgage moneys or interest, and so cause the eviction of the lessees?

It seems to me clear, that unless the agreement can be construed into one not only to allow the mortgage to take priority over the lease, but also as a consent to the lessor—mortgagor—making default in payment of principal and interest, the covenant is literally broken, for the lessees have been literally evicted by reason of an act of the lessor and by a person claiming under her.

I cannot therefore agree that the lessees are without remedy.

I am, moreover, of the opinion that they have a claim upon the moneys in Court.

They had an estate in the land. As between them and the mortgagee, they could not set up such estate to prevent the sale of the land and the realization of the mortgage moneys ; but as between them and the lessor no such agreement was made, and they had the right to enjoy the land, and their estate or interest therein, free from interruption.

The land has been sold, and the balance after payment of the mortgage moneys is in Court. Suppose that the whole purchase moneys had been paid into Court, and the various claims had been made in respect to the several estates or interests created by the lessor, the owner in fee. What would be their order ? Would it not be as follows :—

1. The London and Ontario Investment Company, by virtue of its first estate or interest conveyed by mortgage.

2. The lessees, by virtue of the estate or interest conveyed to them by the lease.

- 3 & 4. The several mortgagees under their respective mortgages. And then, if no further claims entitled to rank by virtue of any estate lien or interest, the lessor, or her estate, would be entitled to the residue.

I really see no more difficulty in so deciding than in providing for the dower of the widow of a mortgagor when, by joining in the mortgage, she has in effect postponed her claim upon the lands to the claim of the mortgagee.

It seems to me that the plaintiff is entitled to a declaration that she is entitled out of the moneys in Court to receive the value of her one-third interest in the unexpired term of the lease, by which I would understand one-third of the net annual value or profit, which would have been derived therefrom had the lessees been permitted to remain on the land during the term.

It also seems to me that the value must be computed with reference to the agreement, that if at the end of the term it might not be renewed the lessees would be entitled to the value of the trees and improvements. These trees were planted and improvements made by the lessees, and in a sense belonged to them. They were to be paid for then, or the lease was to be renewed. So soon as they were placed in or upon the ground the value of the lessees' interest in the land was increased thereby, and the land having been sold and the purchase money increased by their being added to the property, it would be inequitable to hold that in determining the value of the lessees' interest in the land their value should not be considered. How much the value of such estate or interest has been increased will be ascertained on the reference.

In the above view it will not be necessary to consider the question of the plaintiff's right to recover for breach of the agreement to renew or to pay the value of the trees and improvements. By the lessor's own act it has been made to appear now that it will be impossible to renew, and the value of the improvements can be considered in the manner above pointed out.

As both lease and agreement were registered prior to the subsequent mortgages, the subsequent mortgagees took with full notice of the rights of the parties.

I think the plaintiff's motion must be granted in the terms above indicated, and with costs; and the defendants' motion dismissed, with costs.

MACMAHON, J., concurred with ROSE, J.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

CASEY V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Accident—Contributory negligence—Engine and tender, whether constitutes train—Obligation to ring bell or blow whistle—R. S. C. ch. 109—Judgment where jury disagree.

The defendants' station at A. was on what was known as the side track, between which and the main track there was a centre platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the centre platform, when the engine and tender which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed,

Held, that the plaintiff's evidence having shewn that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them.

Quære, whether an engine and tender constitute a train within sec. 52 of R. S. C. ch. 109, so as to require a man to be stationed on the rear thereof to warn persons of their approach; but in any event, there was a man so stationed here who did give warning.

Held, also, that the statutory obligation to ring the bell, or sound the whistle, only applies to a highway crossing, and not to an engine shunting on defendants' own premises.

THE statement of claim alleged that at the station of defendants at the village of Arthur, on the 3rd June, 1886, a train of cars belonging to the defendants was moving reversely along the railway, the engine being in the rear, and the defendants neglected to station on the last car of the train a person who should warn persons standing on or crossing the track of the railway of the approach of the train, nor did they, although it was dark, have any light or other warning on the last car of the train, nor was any warning given the plaintiff by the servants of the defendant of the approach of the train whereby, and by the negligence of the servants of the defendants, the plaintiff, who was lawfully, and without negligence on his part, cross-

ing the track in front of said train, was run over by the train, and had his leg fractured.

The defendants denied all the allegations of the claim.

They claimed that the plaintiff had no right to cross their tracks in the manner in which he did, and that he did so at his own risk and for his own convenience, and that he was guilty of contributory negligence; and alleged that they had complied with all the requirements imposed upon them by statute, and exercised all due care and caution.

The action was tried before Galt, C. J., and a jury, at Orangeville, at the Autumn Assizes of 1887.

At the conclusion of the case, the learned Chief Justice submitted several questions to the jury, none of which were answered; and the jury, being unable to agree, were discharged.

In Michaelmas Sittings, 1887, *G. T. Blackstock* obtained an order *nisi* calling upon the plaintiff to shew cause why, notwithstanding the disagreement of the jury and their failure to answer the questions submitted, the action should not be dismissed, on the ground that there was no evidence to go to the jury of negligence on the part of defendants; and on the ground that by reason of plaintiff's own negligence in crossing the track without looking, the action should have been dismissed by the learned Chief Justice; that the evidence shewed without contradiction that the defendants had observed all proper precautions to protect persons crossing the track and to discharge any duty which may have rested upon them.

During Hilary Sittings, February 10, 1888, *G. T. Blackstock* supported the order, and referred to *R. S. C. ch. 109, sec. 52, p. 1494*; *Davey v. London and South Western R. W. Co.*, 11 Q. B. D. 213; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41; *Johnston v. Northern R. W. Co.*, 34 U. S. R. 432; *Stubbley v. London and North Western R. W. Co.*, L R. 1 Ex. 13; *Chicago and North Western R.*

W. Co. v. Gertsen, 15 Bradwell (Ill.) 615; *Skelton v. London and St. Katharine's Dock Co.*, L. R. 2 C. P. 631.

James Reeve, contra, referred to *Dublin, Wicklow, &c. R. W. Co. v. Slattery*, 8 App. Cas. 1155; *Bennett v. Grand Trunk R. W. Co.*, 7 A. R. 470.

March 10, 1888. **MACMAHON.**—The defendants' station at Arthur is on the south side of what is known as the side track of the railway, and between that and the main track there is a platform for the convenience of passengers alighting from and getting on the railway carriages on the main line.

The mixed train from the east reached the station on the main line at 8:24; and the plaintiff, who was coming from the village of Arthur to the station to meet a Miss Healey, who was to arrive by that train, says the train had stopped before he reached the station platform, where Miss Healey, then was. He conversed with her a few minutes, and understood from a remark she made that she had forgotten her rubbers in the car she had just left. The plaintiff at once turned to cross the side track, intending to tell Mr. Gordon, the station master, who was then standing on the centre platform, about the rubbers; and he had just reached the side track from the platform when the engine and tender, which had been detached from the train, and were backing down from the west on the side track to pick up a car standing about fifty yards to the east of the station, ran over him, causing the injury complained of.

In his examination in chief, the plaintiff gives an account of his movements on leaving the station platform, and said, in reply to questions by counsel :

Q. How far had you got on to the side track when you came in contact with the tender? A. I think I was about half way across when they backed on to me, near the centre of the track. Q. Describe now just what happened; how the accident occurred; what you saw, and so on? A. Well, I saw the back of the tender when it ran up to me; I caught hold of something on the back with my hand. Q. How far was it from you when you saw it? A. It was just on me; some person hollowed to me to look out; I turned kind of half round; I caught hold of the back

of it with my hand, and was shoved on a piece ahead of it, or scrambled on ahead with it ; it shoved me along with it.

On cross-examination by Mr. Blackstock the plaintiff said :

Q. I understand you to say you would not have gone across to the platform between the siding and the main track if it had not been for something Miss Healey said about rubbers ? A. No. Q. At the time you started to go there you supposed the engine was on the main track ? A. Yes. Q. And at the head of the train on which Miss Healey had come ? A. Yes. Q. You told my learned friend when you turned to come away from Miss Healey you turned towards the east ? A. Yes, I turned around to my right, turning my face in the opposite direction to that in which the engine was coming ; I stepped down. Q. That is why you could not see the engine ? A. Yes. Q. Now, how long was it between the time you stepped from the platform and the time you were injured ? A. Well, it would be only a second or so. Q. When you turned towards the east you say you saw this box car ? A. Yes, I saw a car down there. Q. How far was that box car which you saw to the east from you ? A. I would judge between 40 or 50 yards ; I never measured the place. Q. According to your judgment you think it would be about 150 feet away from you ? A. I think about 50 yards, as near as I can judge by looking. Q. Then there is no doubt that the box car which you saw was very much further away than the engine from you when you started to cross the track ? A. I did not know where the engine was, because I did not see it. Q. Now, if the engine struck you a second or two after you left the platform the engine must have been very near on top of you when you got on the track ? A. Well, I did not see it. Q. You are a man of intelligence—you can reason that out ? A. I do not know what distance it was ; I did not see it. Q. Be candid, now ; what is your belief about that ? A. I cannot tell how far it was off ; I have no doubt the engine may have been nearer to me than the box car was. Q. Now, is your story true about that, because it is a very important point, and you have sworn to it ; I want to see if you are going to stick to it, going to tell the jury it was not more than a second or so after you left the track before you were struck ? A. Yes. Q. Then you did not see the engine until you were struck, you told my learned friend ? A. No, I did not see it. Q. Then, of course, Mr. Casey, you did not look up the track to see ? A. Well, of course, I gave a glance when I left the station. Q. Now, was there anything to prevent you seeing it ? A. I do not know ; I did not see anything on the track. Q. So that is the fact, isn't it ; there was nothing between you and the engine ? A. Not that I saw. Q. And there was nothing to prevent a look ; there was nothing to prevent you seeing ; that is so, isn't it ? A. Well, I took a look up the track and down when I was leaving the station platform. Q. If you had taken the precaution to look, there was nothing to prevent you seeing ? A. I do not know ; I did not see anything. Q. Then did you stop at all between

the time you left Miss Healey to go across the track and the time you were struck? A. I stopped when they hollowed to me, and kind of turned round or half round, and they struck me. Q. Which way did you turn? A. To the right, towards the direction in which the engine was coming; I walked on from the time I left her until the time they hollowed and I was struck. Q. Up to the time you turned around that way you did not see the engine at all? A. No; at that time it was right on me; it struck me as soon as I turned around to look; I saw the back of the tender then. Q. Where were you when you heard the cry—somebody called to you to look out? A. I was somewhere between the two rails on the siding. Q. Had you one foot over the south rail? A. I was walking in between the rails, just off the step into the centre of the two rails, as I understand. Had you one foot over the south rail, that is, the rail furthest away from the platform where you were standing talking to Miss Healey? A. No; I had not my foot over that. Q. It would be very difficult for you to recollect your position at the time you were struck? A. Well, I know I was between the rails; I cannot say the precise spot.

On re-examination by Mr. Meyers he said:

Q. When you started from Miss Healey, how many steps had you to take before you got on this track? A. I think I made one step on the platform, and I made another step off the platform on to the track. I think that is all before I got on to the track.

Miss Healey, who was called as a witness for the plaintiff said:

Q. When he started to go from you towards Mr. Gordon, how far was he from the edge of the platform of the station? A. Not more than three or four feet. Q. How many steps would he require to take? A. About three steps; I could go in three steps myself. Q. How far was the near rail of the switch from the edge of the station platform upon which you were standing? A. I think one step would be sufficient to reach that. Q. Do you know, when he turned round to leave you, which direction he turned in? A. I cannot say as to that. Q. Did you see him stop on the track? A. I saw him stop on the track when the yell was given. Q. Who gave this yell? A. I do not know, sir, the yell was to leave the road, I think; there were quite a few people standing around, but I was a stranger among them, except to two.

On cross-examination she said:

Q. And within a few seconds after he left you he was struck? A. Yes; I would not think it would be any more than a second or two before he was struck; the distance from me to the first rail would be about three steps. Q. Did he take those steps rapidly? A. I would not say to that. * * * Q. I am not asking you that; I am asking you whether you had been paying any attention to the engine up to this time—not to the train, but to the engine? A. No, sir. Q. But the first you saw was

just as he stepped from you on to the track the engine struck him? A. Yes. Q. All done in the twinkling of an eye? A. Yes; I heard a yell, but I could not say who gave it. Q. It was still quite light? A. Yes; it was quite light.

Matthew Bunting, the brakeman on the train, said, in evidence, that he went on the engine to the switch, and turned the switch to permit the engine to back up on the side track. He then went to the back of the tender, and sat on the board that runs across the tender while the engine was backing down on the side track. He saw some person get off the platform on to the track, at which time the engine was about eighty feet from the man, and, when about ten feet from the man, he gave a signal to the engine driver to stop by throwing up his arms and hollowing.

The evidence is, that the engine, whilst backing down, was going at the rate of between three and four miles an hour; and it is stated by two or three witnesses that an engine running at that rate of speed can be brought to a stand within the length of the engine and tender—forty to fifty feet.

The affirmative of the issue being on the plaintiff to establish what he is bound to do in order to entitle him to recover against these defendants, the question is, has he, on the undisputed facts as disclosed in his own evidence and that of Miss Healey, called as a witness on his behalf, made out such a case as entitled the plaintiff to have it submitted to the jury? or, what is the same thing, are the undisputed facts, on the plaintiff's own evidence, of such a nature as to shew that the accident resulted from the want of ordinary care on the plaintiff's part, and that therefore the learned Chief Justice should have dismissed the action?

At the time the plaintiff started to cross the side track he supposed the engine was still on the main track, and, assuming that to be the case, he started to cross, and, as he started, turned his face in the opposite direction to that from which the engine was coming; and that, he says, is the reason he did not see the engine, and from the time he stepped from the platform to the track and received the injury it was only a second or so.

There was no obstruction in his way to prevent his seeing the engine, and, on looking eastward, it was light enough for him to see the car, fifty yards distant, which the engine intended to pick up; and Miss Healey says "it was quite light;" and the evidence for the defence is to the same effect.

It is, therefore, apparent that the plaintiff undertook to cross the track without taking the precaution to look in the direction from which the engine was coming. Had he looked he must have seen the engine coming down the track in close proximity to where he intended to cross; and, had he seen the engine and chosen to make the attempt at crossing, and was injured, the risk would be his and his alone. If the plaintiff could have seen that the engine was in close proximity to him by looking in that direction, but did not take the precaution to look prior to crossing, and is injured while so crossing, is the risk he was assuming not also his risk?

I think it was his risk in the last case put just as much as much as in the hypothetical case first put, unless the defendants, by the omission of some duty cast upon them, have been the proximate cause of the injury which the plaintiff has sustained.

One act of negligence charged against the defendants was, in not complying with the requirements of the 52nd section of the Railway Act, R. S. C. ch. 109, which enacts that "Whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, the company shall station, on the last car in the train, a person who shall warn persons standing on or crossing the track of such railway of the approach of such train."

The words used in the above section, "train of cars," may mean something more than an engine and tender.

This point it is, however, not necessary to decide in the present case.

If the station was within the limits of the village of Arthur, and if the engine and tender can be considered a "train of cars," then the defendants have complied with

the statutory obligation by having a man stationed on the rear part of the tender who warned the plaintiff, but not in time to prevent the accident.

It would be almost an impossibility to prevent the accident, because, when the plaintiff started to cross he was only about three steps from the rail, and had, according to his evidence, only reached between the rails when they "hollowed," and he was struck by the tender.

Were the engine and tender to be regarded as a "train of cars," then the evidence of Matthew Bunting shews he was stationed on the rear of the tender while backing up; and his evidence is supported by the engineer and fireman on the engine. So that, if it had been necessary to submit that question to the jury, their finding must have been in favour of the defendants.

The other ground of negligence charged was, that the bell was not rung; and a great deal of evidence was taken as to that. The statutory obligation imposed upon railways to ring a bell or blow a whistle applies only to the occasions when the engine approaches a place where the railway crosses the highway; and that obligation does not arise where, as in this case, the engine was shunting on the defendants' own premises: R. S. C. ch. 109, sec. 25, sub-sec. 7.

It may be that ringing a bell would be a necessary precaution to take in running over a track which passengers and others are obliged to cross to reach the main track; but, as to that, I express no opinion, as I consider the injury sustained by the plaintiff was attributable solely to that want of care which an ordinarily prudent man would have exercised; for had that care been exercised the accident could not have happened.

In *Davey v. London and South-Western R. W. Co.*, 12 Q. B. D. 70, in appeal, Bowen, L. J., at p. 77, says: "It was broad daylight, and as soon as he" (the plaintiff) "had entered the wicket gate—had he been a sensible man, he would have looked up and down the line to see if there was a train coming either way. A train was, in fact, so close to him that he was only able to cross fifteen feet before he

found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him ?”

See, also, the observations of Lord Cairns in *Dublin Wicklow, &c., R. W. Co. v. Slattery*, 3 App. Cas., 1155, at p. 1166.

In the case of *Commissioner for Railways v. Brown*, 57 L.T.N.S. 895, Lord Fitzgerald, in giving the judgment of the Privy Council, at p. 896, in speaking of the respondent's (the plaintiff's) conduct, says : “It was a matter of seconds. The delay of a few seconds would have prevented this calamity, but he chose to make a rush across, and, in fact, instead of the motor running into him he ran into the motor.”

A few seconds would suffice, after the plaintiff left Miss Healey, for the tender to reach the place where the plaintiff crossed ; and, in fact, he states it was only a second or so after he reached the track before he was struck by the tender; so that, instead of the tender running into him, he ran into the tender.

To reiterate the language of Bowen, L. J., in *Davey v. London and South Western R. W. Co.*, and apply it to this case, “Is it open to any reasonable mind to draw the inference that the accident to the plaintiff was caused by anything but the gross negligence of the man who never looked at a train which was within a few feet of him ?”

We think that on the undisputed facts in the present case had the jury found in the plaintiff's favor their finding could not have been allowed to stand. We think the learned Chief Justice should have dismissed the plaintiff's action at the trial.

We order that the plaintiff's action be dismissed, and judgment entered for the defendants, with costs.

GALT, C. J., and ROSE, J., concurred.

[QUEEN'S BENCH DIVISION.]

RE ST. CATHARINES AND NIAGARA CENTRAL RAILWAY
COMPANY AND BARBEAU.

Railway company—Incorporation by Provincial Act—Subsequent legislation by Parliament of Canada—Applicability of secs. 4 to 39 of the general Railway Act of Canada.

A railway company, incorporated by an Act of the Ontario Legislature, was thereby authorized to construct, equip, and operate a railway between certain points.

By an Act of the Dominion Parliament the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament.

Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected; that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada" (see sec. 3 of the Railway Act of Canada, R. S. C. ch. 109); and therefore secs. 4 to 39 of R. S. C. ch. 109 did not apply to it; and a motion to a Judge of the High Court of Justice under sec. 8 for a warrant of possession of certain lands was refused.

THIS was a motion by the St. Catharines and Niagara Central Railway Company upon notice to L. E. Barbeau, the owner of certain lands in the town of Thorold, for an order or warrant placing the railway company in possession of the lands in question, in pursuance of sub-sections 30 and 31 of section 8 of "the Railway Act," R. S. C. ch. 109.

The motion was opposed by the land-owner, upon the sole ground that section 8 of the Railway Act did not apply to this particular railway company,

The motion was argued before Street, J., on the 17th January, 1888.

Aylesworth, for the company.

Robinson, Q. C., for the land-owner.

January 21, 1888. STREET, J.—The St. Catharines and Niagara Central Railway Company was incorporated by ch. 73 of 44 Vic., Ontario Statutes of 1881, and by their Act of incorporation were authorized to construct, equip, and operate a railway between the points mentioned in the Act, and received the necessary powers to enable them to carry into effect the objects of their incorporation. The power to acquire their right of way was conferred by the incorporation into the special Act of certain clauses of the Railway Act of the Province of Ontario.

By various Acts of the Legislature of the Province of Ontario, the last being 49 Vic. ch. 78, they received further powers and privileges, which do not affect the matter under consideration.

The company first appears in the Dominion Statutes, ch. 24, 50-51 Vic. (1887), by which the Governor in Council is authorized to grant "to the St. Catharines and Niagara Railway Company for twelve miles of their railway, from the city of St. Catharines to the bridge over the Niagara river, a subsidy not exceeding \$3,200 per mile," towards the construction of the railway.

By section 1 of ch. 60 of 50-51 Vic. (1887), of the Dominion "the St. Catharines and Niagara Central Railway is hereby declared to be a work for the general advantage of Canada;" and by section 2 of the same Act the company is authorized to build a branch line from a point on its line between Hamilton and Toronto to a point on the Credit Valley Railway.

No further powers of any kind have been conferred upon this company by the Dominion Legislature.

The effect of the declaration in sec. 1, ch. 60 of 50-51 Vic., that this railway is a work for the general advantage of Canada, is to bring it under the exclusive legislative authority of the Parliament of Canada, by the operation of the 29th sub-section of section 91, and paragraph (c.), of sub-section 10 of sec. 92 of the British North America Act. No other effect being given to such a declaration, the Acts of the Provincial Legislature pre-

viously passed are in no way affected, but the Provincial Legislature is thenceforward unable to repeal or amend them.

By section 3 of ch. 109, R. S. C., being "the Railway Act" of Canada, it is provided that "the provisions of this Act, from section 4 to section 39, both inclusive, being part one of this Act, shall apply to every railway constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada, and shall, in so far as they are applicable to the undertaking, and unless they are expressly barred or excepted therefrom by the special Act, be incorporated with the special Act, form part thereof, and be construed therewith as forming one Act."

By sub-section (a.) of section 4 of the same Act "the special Act means any Act authorizing the construction of a railway with which this Act, or 'The Railway Act, 1868,' or 'the Consolidated Railway Act, 1879' is incorporated."

The railway of this company is being constructed, and its construction could not have been begun, nor could it be proceeded with except under the authority of some Act of a Legislature or Parliament entitled to confer upon it the necessary powers. The necessary powers have been conferred upon it by the Legislature of the Province of Ontario. They have not been conferred upon it by the Parliament of Canada; its construction must therefore be proceeding under the authority, not of any Act of the Parliament of Canada, but of an Act of the Legislature of Ontario, and if that Act could by any means be obliterated from the statute book, the railway company would be without any authority whatever to proceed with the construction of its work.

I must therefore hold that part one (being sections 4 to 39, inclusive) of ch. 109 of the R. S. C. does not apply to this railway, and must dismiss the application with costs.

[CHANCERY DIVISION.]

BARBEAU V. THE ST. CATHARINES AND NIAGARA CENTRAL
RAILWAY COMPANY.

Railways and Railway Companies—Expropriation of lands—Dominion Railway Act or Provincial Railway Act—Work for general advantage of Canada—Notice.

In an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a County Judge for a warrant for possession of certain lands, required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served as required by the provisions of the Ontario Railway Act.

Held, under the circumstances of this case, and following *Clegg v. The Grand Trunk Railway Co.*, 10 O. R. at 713; and *Darling v. The Midland Railway Co.*, 11 P. R. 32; that the defendants were no longer within the operation of the Ontario Statutes.

Held also, that a notice requiring the lands given under the Dominion Railway Act, was not a sufficient notice under the Provincial Railway Act.

THIS was a motion for an injunction in an action brought by L. A. Barbeau against the St. Catharines and Niagara Central Railway Company to restrain the defendants from applying to a County Judge, under the provisions of the Ontario Railway Act, R. S. O. ch. 165 (1877), for a warrant for possession of the plaintiff's lands, on the ground (1) that the Ontario Railway Act did not apply to the defendants' railway as it had been declared a work for the general advantage of Canada, and (2) that no sufficient notice requiring said lands had been served on the plaintiff.

The motion was argued before Ferguson, J., on March 6th, 1888.

Robinson, Q.C., and Collier, for the plaintiff. The defendants were incorporated under an Act of the Ontario Legislature, 44 Vic. ch. 23 (O.) By 50 & 51 Vic. ch. 60 (D.) the undertaking was declared to be a work for the general advantage of Canada, and, where that is done, the cases

shew that it is thereby removed from the jurisdiction of the Ontario Legislature: *Darling v. The Midland R. W. Co.*, 11 P. R. 32; *Clegg v. The Grand Trunk R. W. Co.*, 10 O. R. 708; *Murphy v. The Kingston and Pembroke R. W. Co.*, 11 O. R. 202; *Monkhouse v. The Grand Trunk R. W. Co.*, 8 A. R. 637.

Aylesworth and Towers, for the defendants. The plaintiff's obstruction is vexatious, and is intended to prevent the defendants completing their road within the time limited by statute. The Ontario Railway Act applies to the defendants, and they must take their proceedings under it for the expropriation of the lands they require. Notwithstanding the fact that the defendants' undertaking was made a work for the general advantage of Canada, the benefit of the provisions of the Ontario Railway Act was preserved to them by 46 Vic. ch. 24, sec. 6, sub-sec. 2 (D.) It has been already held by Mr. Justice Street that the Dominion Railway Act does not apply to these defendants. (a)

Robinson, Q.C., in reply.

March 15, 1888. FERGUSON, J.—This is a motion, on behalf of the plaintiff, for an injunction restraining the defendants from applying to the Judge of the County Court of the county of Welland, under sec. 20, sub-sec. 23, of the Railway Act of Ontario, R. S. O. ch. 165 (1877), for a warrant placing them in immediate possession of the plaintiff's lands in the town of Thorold, in the county of Welland, being part of lots 57 and 58 on the west side of Front street in the said town of Thorold, until the trial of this action, or until further order, on the ground that the Railway Act of Ontario does not apply to the defendants' railway; and, even if it does, no notice requiring the lands has ever been served upon the plaintiff, as required by the said Railway Act.

The defendants were incorporated by 44 Vic. ch. 73—an Act of the Legislature of Ontario. This Act does not say that the general Railway Act of Ontario, ch. 165, or

(a) Ante p. 583.—REP.

any part of it, shall apply to the undertaking; but the general Act provides, by sec. 4, that when not otherwise expressed the sections of it from this sec. 4 to sec. 36, inclusive, shall apply to every railway which is subject to the legislative authority of the Legislature of the Province, and has been authorized to be constructed by any special Act of the late Province of Canada, or of this Province, passed after the 30th day of August, 1851, or authorized to be constructed by any special Act passed after the passing of the general Act, and that the general Act shall be incorporated with every such special Act; and that all the clauses and provisions of the general Act, unless otherwise expressly varied or excepted by the special Act, shall apply to the undertaking authorized thereby so far as applicable to the undertaking, and shall, as well as the clauses and provisions of every other Act incorporated with the special Act, form part of the special Act and be construed together therewith as forming one Act. By sec. 6 of the general Act, it is provided that the power given by the special Act to construct the railway, and to take and use lands for that purpose, shall be exercised subject to the provisions and restrictions contained in the general Act.

What the defendants now desire is the issue of a warrant under the provisions of the 23rd sub-sec. of sec. 20 of the general Act, and had there been no subsequent legislation affecting the subject, one would have thought it plain the sections of the general Act mentioned in sec. 4 of it applicable, notwithstanding the provisions of sec. 5 of the general Act, and that therefore the sub-sec. 23 above mentioned applied to the case.

I need scarcely refer to the provisions of the 29th sub-sec. of sec. 91, and sub-sec. 10 (paragraph c) of sec. 92 of the B. N. A. Act. Sec. 6 of ch. 24 of 46 Vic. (D.) provides that the railways mentioned therein are works for the general advantage of Canada, and each and every branch line or railway "now or hereafter" connecting with or crossing such lines of railway, or any one of them, is a work for the general advantage of Canada.

There was some contention at the bar as to whether the defendants' railway falls within the provisions of this enactment. When completed it will (I think there is no doubt) connect with some one or more of the lines of railway mentioned in this 6th section, and I incline to the opinion that it is comprehended within the meaning of the section. It would rather seem that the defendants themselves did not think so, for in the years 1884, 1885, and 1886 they appear to have procured legislation from the Provincial Legislature as if their undertaking was not subject to the legislative authority of the Parliament of Canada; and the Act 50 & 51 Vic. ch. 60, sec. 1 (D.), declares the defendants' railway to be a work for the general advantage of Canada. This Act also authorizes the construction by the defendants of an additional branch, and in the 24th chapter of this 50 & 51 Vic. (D.), there appears mentioned a subsidy to the defendants.

Whatever doubts may have existed as to whether or not the defendants' undertaking fell within the meaning of sec. 6 of 46 Vic. ch. 24 (D.), it seems beyond doubt that since the passing of 50 & 51 Vic. ch. 60 (D.) it is to be deemed a work for the general advantage of Canada and subject to the exclusive legislative authority of the Parliament of Canada: sec. 91. *Ib.*, sub-sec. 29, and sec. 92, sub-sec. 10 (paragraph c), B. N. A. Act.

The defendants, as I understand, and as was stated at the bar, gave their notice for the expropriation of the land in question, under the provisions in that behalf contained in the "Railway Act" of the Dominion, and during the proceedings thereunder an application was made for a warrant, under sub-secs. 30 and 31 of sec. 8 of that Act (R. S. C. ch. 109), which was refused by my brother Street, apparently on the ground that it is shewn by sec. 3 of the Act that the sections from 4 to 39, inclusive (part one of the Act), do not apply to the defendants' undertaking, because their railway is not constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada.

There are some passages in the judgment of my brother Street that seem to indicate, to some extent, that his view was that the defendants possessed the required authority under the provisions of the Provincial enactments.

Sub-sec. 2 of sec. 6 of 46 Vic. ch. 24 (D.), before referred to, is in these words: "Nothing in this section contained shall be construed in any way to affect or render inoperative the provisions of any Act of a local Legislature heretofore passed authorizing the construction and running of any such railway or branch line, or any Act amending the same; but hereafter the same shall be subject to the legislative authority of the Parliament of Canada."

For the defendants, it was contended that the undertaking was within the meaning of this sec. 6, and that this sub-section has the effect of preserving the Provincial legislation authorizing the construction and running of the defendants' railway, which was passed before the passing of that Act (46 Vic. ch. 24 (D.)), and that consequently the provisions of the general Act of the Province regarding "lands and their valuation," including sub-sec. 23 of sec. 20 aforesaid, applied to the case.

This contention seemed and still seems to me to possess very great force. It is, however, to be remarked that ch. 60 of 50 & 51 Vic., an Act that specifically mentions the undertaking, and this alone passed upon the petition of the defendants representing that they desired their railway to be declared a work for the general advantage of Canada, contains no such provision as is found in sub-sec. 2 of sec. 6 of 46 Vic. ch. 24 (D.). The defendants seem to have thought that up to that period their undertaking was not a work for the general advantage of Canada; and the Parliament of Canada seems to have been of the same opinion, for it must, I think, be assumed that it was thought that the Act was necessary for the purpose.

The "Railway Act," R. S. C. ch. 109, sec. 121 (D.), professes to consolidate 46 Vic. ch. 24, sec. 6, and sec. 100 of ch. 9 of 42 Vic. This section mentions the railways that are mentioned in sec. 6 of ch. 24 of 46 Vic., and branch lines

or railways "now or hereafter" connecting with or crossing such lines of railway, or any of them. The clause in the nature of a saving clause in sub-sec. 2 is as follows:—"But the provisions of any Act of the Legislature of any Province of Canada, passed prior to the 25th day of May, 1883, relating to any such railway or branch line, and in force at that date, shall remain in force so far as they are consistent with any Act of the Parliament of Canada passed after that date." I presume the meaning of the last part of this is, so far as they are not inconsistent with any Act of the Parliament of Canada passed after that date.

It was conceded that there is no Act of the Parliament of Canada passed after that date inconsistent with the defendants' special Act incorporating (as I think it does) the provisions of the Ontario general Act that are *now* so important, unless ch. 60 of 50 & 51 Vic. (D.) be so considered.

At least one order for the issue of a warrant for possession has been made in this Court in favour of the defendants, and at their request; but the question decided by my brother Street was not then raised.

I have, since the argument, considered the various enactments referred to by counsel, not a few in number, and considered the matter of the application as well as I have been able, and had there been no decisions affecting the subject I think, as to this part of the case, I should have arrived at a conclusion in favour of the defendants, on the ground that Dominion legislation has, in effect, preserved to them, notwithstanding its being declared by the Parliament of Canada that their undertaking is a work for the general advantage of Canada, the benefits of their special Act, incorporating, as I have said I think it did, the part of the Provincial general Act that appears so important here.

As I understand some of the decided cases to which I was referred, they have at least a very important bearing here. It was contended by counsel that they are conclusive and binding upon me.

In the case *Clegg v. The Grand Trunk R. W. Co.*, 10 O. R. at p. 713, the late Chief Justice Cameron is reported to have said (in considering the effect of sec. 6 of 46 Vic. ch. 24): "I think Mr. Nesbitt's contention gives the true effect of the section. The words 'each and every branch line of railway now or hereafter connecting with or crossing the said lines' cannot be read in the restricted sense claimed for them by Mr. Blackstock, confining their application to lines which are branches of or part of the designated principal lines."

"It is true this liberal construction will put under Dominion control the whole, or nearly the whole, of the railway system of this Province. But it appears that was the intention of the enactment to be gathered directly from the language used. If this be so, the Midland Railway is removed from the jurisdiction of the Ontario Legislature and from the operations of past or prospective legislation in relation thereto by the Legislature."

The action was brought under the Act 44 Vic. ch. 22, (O.) The learned Chief Justice said, at p. 714: "The legislation is not *ultra vires*, but inapplicable by the effect of the Dominion legislation giving to a former provincial work the status of a Dominion work."

The other two members of the Court agreed with the judgment of the Chief Justice.

In the case *Darling v. The Midland R. W. Co.*, 11 P. R. 32, the land had been expropriated by the defendants in 1876. The proceedings to obtain compensation therefor were begun in 1884. It was held that the road became a Dominion work on the 25th of May, 1883, on the passing of 46 Vic. ch. 24, sec. 6, and that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and that therefore an appeal under the provisions of the Revised Ontario Railway Act could not be prosecuted. In delivering his judgment the learned Judge said, at p. 33: "As to proceedings initiated before May, 1883, it may well be that the forms of procedure provided by the Revised Statutes of Ontario should

govern, but after that date all proceedings for compensation under the statute are controlled, in my opinion, by the Dominion legislation." I was also referred to the case *Bowen v. The Canada Southern R. W. Co.*, 14 A. R. p. 1. The remarks of some of the learned Judges there have reference to the subject, or a like subject, but nothing appears to me to be decided that is in point here.

With these cases before me, as I understand them, I think I should be bound, according to the recognized rules of decision, to decide against the defendants upon this branch of the case. Owing, however, to the opinion that I have formed as to the other branch this consideration is not so pressing upon me as it would otherwise be.

The last ground of the motion is, that no notice requiring the lands in question was served upon the plaintiff as required by the Railway Act. On the argument it was stated without any contradiction that a notice had been served under the provisions of the Dominion Act, and it was, I apprehend, in pursuance of this that the motion was made before my brother Street. The contention was as to whether or not that was a good notice as the commencement of proceedings under the Provincial Act. I am of the opinion that it was not, and that there was really no notice requiring the lands, pursuant to which proceedings could be had under the Provincial Statutes or the application to the County Court Judge made for the warrant for possession.

Enactments of a local or provincial character, which confer any exceptional exemption from a common burden, or invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, are to be construed more strictly, perhaps, than any other kind of enactment: *Maxwell* on the Interpretation of Statutes, 268, *et seq.*

The American rule of construction in such cases is found in *Potter's Dwarris* on Statutes and Constitutions at 146. It is rule 21, as the rules are there arranged, and is as follows: "Statutes, by the authority of which a citizen may

be deprived of his estate, must have the strictest construction, and the power conferred must be executed precisely as it is given, and every departure from it will vitiate the proceeding, and this is so whether it be in the exercise of a public or private authority, whether it be ministerial or judicial."

The rule here may not be quite so strict as that, but in such cases the rule is, that the enactment must be strictly construed. The Legislature gives to the body the power to take a man's land, and points out unmistakably and with particularity the way in which it may be done, and it seems entirely clear that it cannot be done in any other way against the will of the owner of the land. The party seeking to take the land must, I think, "make title" (so to speak) under the Act giving the authority so to do, and it cannot be said that a notice given under an Act of one Parliament is good for the purposes of expropriation under the powers conferred by an Act of another Legislature or Parliament. The owner is entitled to retain his land until it is taken from him by the exercise of the given power, which would not be the case if the defendants' contention in this respect was the correct one.

The case *Murphy v. The Kingston and Pembroke R. W. Co.*, 11 O. R. 302, is a precedent for the motion; and I am of the opinion that the plaintiff must succeed on this motion. The order will go for the injunction as asked.

G. A. B.

[CHANCERY DIVISION.]

THE CORPORATION OF THE VILLAGE OF WESTON

V.

CONRON ET AL.

Principal and Surety—Collection of taxes by Treasurer—Liability of surety for.

By R. S. O. ch. 180, s. 10, no assessor or collector shall hold the office of clerk or treasurer. The treasurer of plaintiffs, who was also clerk, was in that capacity permitted by resolution of the council to retain the collector's roll for three months and he was granted a percentage on moneys received by him for taxes.

In an action against him and his surety.

Held, that that temporary function was not of such a nature as to terminate his duties as treasurer by necessary implication, and that when the money came to his hands with which he charged himself as treasurer, the responsibility of the surety began, but that the latter should not be charged with any sums which did not appear in the books of the former as treasurer and which were referable to taxes otherwise received by him.

THIS was an appeal from a report of an official Referee, and a motion for judgment on further directions.

The action was brought by the Corporation of the village of Weston against William John Conron as treasurer of the said corporation, and William Nason, who was surety for the due performance of the treasurer's duties, &c.

The defendant Conron who was clerk of the municipality, was also appointed treasurer by by-law passed the 16th January, 1882, to receive moneys, to pay accounts, and to perform all duties pertaining to the office of treasurer, for which he was to be paid the sum of \$20, to be paid in quarterly instalments.

The bond on which the defendant Nason was security was dated the 1st July, 1882, and provided for the due accounting for and payment over of all moneys that would thereafter come to Conron's hands by virtue of his said office as treasurer.

On the 18th September, 1885, a resolution of the council was passed in these words :

Resolved, that the clerk be allowed to retain the collector's roll until the 1st November next, and that he be allowed the same percentage for collecting the taxes as was allowed to the collector last year, that is 5 per cent., and he is hereby instructed to have the whole taxes paid in by that time if possible, and that the seal of the corporation be attached.

The Referee in taking the accounts charged the defendant Nason with all sums come to the hands of Conron in that year, whether in his capacity as treasurer or under the said resolution.

From this finding* the defendant Nason appealed, and the appeal and motion for judgment came on for argument on March 21, 1888, before Boyd, C.

Foy, Q. C., and *J. Nason*, for the defendant Nanson. The legal effect of the resolution of September, 18th, 1885, was to make the treasurer a collector as well, and no assessor or collector shall hold the office of clerk or treasurer: 44 Vic. ch. 25 sec. 12 (O). A complete alteration was made in his duties and the risk was increased so the surety was discharged, *De Colyar's Law of Guarantees*, 2nd ed. 237. As to one person holding incompatible offices see *Regina v. The Mayor, &c., of Bangor*. 18 Q. B. D. at p. 361.

J. K. Kerr, Q.C., contra. The evidence shews the treasurer was never appointed collector although he was allowed to receive money from the ratepayers. He acted as treasurer when he collected as municipal clerk and paid himself. There would be no difference if another person collected and paid him. There was no enlargement of the responsibility of the surety: *Exchange Bank v. Springer*, 13 A. R. at p. 407.

Foy, Q.C., in reply.

* There was another ground of appeal, viz., that the treasurer was only appointed for one year (1882) and that the surety could not be charged with any moneys received in subsequent years as the Referee had done, but it appeared during the argument that the treasurer had continued in office from year to year continuously from 1882 to 1887, and the learned Chancellor dismissed the appeal as to that ground.—RKP.

April 9, 1888. BOYD, C.—If the surety is charged only in respect of moneys which came to the hands of his principal, as treasurer for the year 1885, and with which the principal has charged himself as treasurer for that year, I agree with the holding of the Referee.

The treasurer, who was also the municipal clerk, was not appointed to the office of collector though as clerk he was by resolution allowed to retain the collector's roll from September to November, and granted a percentage compensation on the moneys received by him for taxes.

This temporary function was not of such a character as to terminate his duties as treasurer by necessary implication. He was still an officer of the same municipal corporation and receiving the very same moneys which he would have received if a collector had been regularly appointed.

The transaction was an irregular but not an illegal one, so far as the receipt of the tax-money was concerned. When the money came to his hands, with which he charges himself as treasurer, the responsibility of the surety begins, and the previous departure from the directions of the statute is not a matter that concerns the surety. *Qua* treasurer, the risk and responsibility attaching to the taxes for 1885, received by the principal, is the same as if they had reached his hands through a properly appointed collector. See *Guassen v. United States*, 97 U. S. R. 584.

The Referee will certify whether anything is charged against the appellant for the year 1885, which does not appear in his books as treasurer and which is referable to taxes otherwise received by him, and the sum of these receipts will be deducted from the amount reported due.

If there is nothing to be thus deducted the appeal is dismissed, with costs, and judgment is for the amount in the report, with costs. If anything is to be deducted the parties may speak on the question of costs of appeal.

[COMMON PLEAS DIVISION.]

REGINA V. HAGERMAN.

Criminal law—Forgery—Witness interested—Corroboration—R. S. C., ch. 174, sec. 218—Partnership.

By sec. 218 of R. S. C. ch. 174, "The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting forgery,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co. on the Quebec Bank, which he had altered from \$400 to \$1,400. The evidence in support of the forgery was that of J., who though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability, and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.'s withdrawal.

Held (Rose, J., dissenting), that J. was not a person interested, or supposed to be interested, within the meaning of the Act; and his evidence did not require corroboration.

This was a case reserved by Armour, C. J., before whom it was tried at Welland.

The prisoner was indicted for forgery.

The indictment in the first count, charged that the prisoner "a certain warrant and order for the payment of money, to wit: a certain cheque signed by Howland, Jones & Co., upon the Quebec Bank for the payment of \$400, feloniously did alter so as to increase the apparent value of the said cheque from \$400 to the apparent value of \$1,400, and apparently to warrant and order the said Quebec Bank to pay the said sum of \$1,400 to the bearer of the said cheque with intent thereby them to defraud, against the form of the statute in such case made and provided.

There were other counts, but it is considered unnecessary to set them out, as the question reserved for the consideration of the Court has reference equally to them all.

At the close of the case for the prosecution, Mr. Colin MacDougall, Q.C., objected that there was no corroborative

evidence, and that as Jones was interested at the time when the alleged forgery was committed, corroboration was necessary.

The learned Chief Justice stated, "I will reserve any reasonable point you take; I will tell the jury it does not require to be corroborated at present; and I will reserve the question."

The jury gave a verdict against the prisoner; and the learned Chief Justice submitted the following case for the opinion of the Court:

"The evidence for the Crown and on behalf of the prisoner, material for the consideration of the question, is appended hereto, and forms part of, and it and the exhibits filed, are to be considered as embodied in this reserved case. On the application of the prisoner's counsel, I respited sentence, and reserved the following questions for the opinion of the Justices of the Common Pleas Division of the High Court of Justice.

1. Was it necessary to give evidence corroborating the witness Jones that the cheques were forged cheques, it being alleged on behalf of the prisoner, that Jones's evidence required corroboration on the ground of interest?

2. Was Jones an interested witness?

3. If so, and if your Lordships should be of the opinion that his evidence required corroboration, was there sufficient corroboration offered on behalf of the Crown to sustain the conviction?"

In Hilary Sittings, 1888, the case was argued.

Colin Macdougall, Q. C., for the prisoner, referred to *Regina v. Bannerman*, 43 U. C. R. 547; *Regina v. Gibson*, 18 Q. B. D. 537; *United States Express Co. v. Donohoe*, 14 O. R. 333, 348; *Regina v. Giles*, 6 C. P. 84.

J. K. Kerr, Q. C., for the Crown, referred to *Starkie* on Evidence, 2nd ed. 338, 3rd ed. 24, 118, 129; 9 Geo. IV. ch. 32; *East's Pleas of the Crown*, 1002-3; *Phillips* on Evidence, 8th ed., p. 65; *Regina v. Boyes*, 1 B. & S. 311, 327; *Costello v. Hunter*, 12 O. R. 339; *Re Monteith*, 10 O. R. 547; *Parker v. Parker*, 32 C. P. 127.

March 24, 1888. GALT, C. J.—It was not disputed at the trial nor, on the argument, that the prisoner had received the sum of \$1,400 from the bank, nor was the signature of Howland, Jones & Co., called in question.

It was also proved that, so far as the witness Thomas Jones was concerned, he was no longer a member of the firm of Howland, Jones & Co., and had been released by his partner from all liability. This was stated by himself and corroborated by a witness named Lawson, who proved that the dissolution of the firm of Howland, Jones & Co. took place in July, 1886. The alleged forgery was committed on 10th December, 1885, at which time Jones was a partner.

Sec. 218 of ch. 174, R. S. C. enacts: "The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the '*Act respecting forgery*,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

Mr. Macdougall contended that under this section, the learned Chief Justice was in error in holding that the evidence of Jones did not require corroboration, because it was proved that at the time when the alleged forgery was committed, he was an interested party. He relied on the case of *Regina v. Giles*, 6 C. P. 84; but that case does not bear on the one now before us, because the witnesses were at the time of the trial both interested parties—viz., the man whose name was forged and the person who had furnished the goods; and there was no corroboration.

He relied also on the case of *Regina v. Bannerman*, 43 U. C. 547. In this case, the principal witness was interested at the time of the trial, and required corroboration.

On referring to the sections of the Act bearing on the question now under consideration—viz., the 214th and 218th, it appears to me to be plain that the Legislature had reference to the time at which the evidence is given.

Section 214 enacts: "No person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case." Then section 218 enacts "The evidence of any person interested or supposed to be interested in any deed," &c., "shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

If I am correct in this view, it was not necessary to corroborate the evidence of Jones, because at the time of the trial he had no interest. Mr. Macdougall urged that possibly his creditors might have an interest. I cannot see the force of this argument, for the forgery was not one on which any liability could attach against the firm of Howland, Jones & Co.; but, on the contrary, was one by which either they or the Quebec Bank had been defrauded.

As respects the second question then. In my opinion Jones was not an interested witness.

As respects the third question, as I am of the opinion for the above reason that Jones's evidence did not require corroboration, it is unnecessary to refer particularly to the testimony; but I may say there was enough corroboration in the written evidence produced.

It is unnecessary to consider the case of *Regina v. Gibson*, 18 Q. B. D. 537, referred to by Mr. Macdougall, as I think the charge of the learned Chief Justice as to the weight of Jones's evidence without corroboration was correct. The conviction must be affirmed.

MACMAHON, J.—The clause of the Act to be considered in connection with the case reserved for the consideration of the Court, is sec. 218 of R. S. C. ch. 174, which is as follows: "The evidence of any person interested or supposed to be interested in respect of any *deed, writing, instrument*, or other matter *given in evidence* on the trial of any indictment or information against any person, * * shall not be sufficient to sustain a conviction * * unless

the same is corroborated by other legal evidence in support of such prosecution."

The interest of the witness must be in the instrument upon which the charge of forgery against a prisoner is founded, and which is given in evidence at the trial.

Did Jones require from the Quebec Bank on which corporation the cheque was drawn—the forgery of which formed the charge in the indictment—a release from liability as to that cheque, in order to be divested of any interest therein, so as to dispense with the necessity for corroboration?

Had this been a promissory note which had passed into the hands of the bank as holders thereof, a release from the bank would have been necessary in order to enable Jones to become a witness whose evidence did not require corroboration: *Rex v. Akhurst*, 1 Lea. Ch. (4th ed.) 150; *Rex v. Taylor*, 1 Lea. Ch. (4th ed.) 214.

But that is not the present case. It must be borne in mind that the relationship of banker and customer existed between the Quebec Bank, the drawees of the cheque, and the firm of Howland, Jones & Co., in order to see what was the position of Jones at the time he was called as a witness.

In *Chalmers on Bills*, 3rd ed., p. 234, the relationship between a banker and his customer is shortly stated there. He says: "In the absence of special contract, the relations between a banker and his customer are those of debtor and creditor; and in addition, the customer is entitled to draw cheques on the banker to the extent of the sum for which he is creditor." And see *Foley v. Hill*, 2 H. L. Cas. 28, and *Re Hallett's Estate*, 13 Ch. D. 696, at pp. 727-8.

When the cheque was presented at the bank and paid, the presumption is, that the amount for which it was apparently drawn, was there to the credit of the firm of Howland, Jones & Co., and that that amount (\$1,400) was debited to the account of that firm.

Let us assume that at the time of the presentation of this cheque, \$1,400 was the total sum to the credit of

Howland, Jones & Co., the payment of the cheque would have balanced the account. Had Jones the following day assigned his interest in the firm to Howland, Jones & Co., what would have been Jones's position in relation to the bank regarding this cheque?

If the bank improperly paid out \$1,400, when they should have paid out only \$400, then the bank are debtors to Howland, Jones & Co. to the extent of \$1,000. And Jones having parted with his interest in the assets to Howland, any benefit to be derived by the firm being creditors of the bank to the extent of the \$1,000 must pass to Howland. Jones can have no interest whatever under the circumstances stated; and the facts in this case make no difference in regard to the position of the parties.

If the bank were entitled to charge the \$1,400, the full amount for which the cheque purported to have been drawn to the account of Howland, Jones & Co., as coming within the principle of *Young v. Grote*, 4 Bing. 253, which case, as explained by Parke, B., in *Bank of Ireland v. Evan's Charities of Ireland*, 5 H. L. Cas. 389, at p. 410, meant that "the fault of the drawer of the cheque * * misled the banker, on whom it was drawn, by the want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently, that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment." Even this could make no difference in regard to the position of Jones as a witness on the trial of the prisoner.

Under the circumstances stated, the account of Howland, Jones & Co. with the bank, would have been depleted to the extent of \$1,000 in excess of the amount for which the cheque was intended to be drawn; and by this means Jones's capital in the firm was lessened at the time of the payment of this check by the bank. Yet when he parted with his interest to Howland, he ceased to have any interest whatever. After assigning his interest to Howland, he could have no claim against the bank respecting the amount

overpaid by them on the cheque ; nor could the bank have, any claim against him in relation to the cheque, for they had debited Howland, Jones & Co. with the full amount of the cheque, and so, under any circumstances, the bank could not have a claim against Jones in respect thereto.

There has been, I think, a misapprehension in treating Howland, Jones & Co. as being possible debtors to the bank in relation to the transaction connected with this cheque. In my humble judgment, for the reasons I have stated, such relationship cannot possibly arise. The relationship might be the other way.

In *Newland's Case*, 1 Lea. (4th ed.) at p. 314, it is said by the Court in reference to the interest of a witness : "The interest " of the witness " must be apparent on the face of the instrument itself, or arise immediately from the nature of the transaction, or from his own acknowledgment ; for, if a witness admit himself to have an interest whether he has an interest in fact or not ; yet the belief of it has an equal operation on his mind ; and in either of these cases it would be an objection to his testimony."

On the trial Jones disclaimed having any interest in the instrument produced in evidence ; and, in the face of that disclaimer and the other facts to which I have adverted, I do not think that Jones was a witness who had an interest or a supposed interest in the cheque forming the charge of forgery against the prisoner.

I take it, a witness who has an interest is one to whom an advantage may accrue from his testimony. There was nothing to show that here.

There was some evidence as to the liabilities of the firm of Howland, Jones & Co. to outside parties at the time of Jones's withdrawal from the firm and of the transfer of his interest to Howland. But whether Howland, Jones & Co. were indebted to outside parties or not, could form no part of the question which the jury were required to consider on the trial of the prisoner ; nor can it, in my view, be a subject which should influence the Court under the case reserved for its consideration.

I am clearly of opinion that Jones was not an interested witness, nor could be supposed to be interested in the cheque given in evidence on the trial of the indictment against the prisoner; and that therefore his evidence did not require corroboration.

I think there must be judgment for the Crown on the case reserved for the consideration of the Court.

ROSE, J.—The first question involves the consideration of the language “interested or *supposed* to be interested.” With some hesitation I think the word “supposed,” may be replaced by “presumed” with which reading I propose to consider this case.

When it appeared that Jones was a partner at the time the cheque was drawn the presumption at once arose that he was interested in respect to it, and such presumption would remain until it was shewn by legal evidence that he was no longer interested.

It is said that in this case, such evidence was afforded at the trial.

The following from the notes of the evidence will shew what is relied upon :

Q. Did you get anything for your interest in the business at all? A. No, Howland assumed the liabilities' and took the debts, and released me from all obligations. Q. Did your creditors release you, the creditors of Howland, Jones & Co? A. I suppose so. Q. Do you know whether they released you or not? A. They are all paid anyway. Q. Answer the question fairly and distinctly. You say you parted with your interest in the business? A. Yes. Q. You got some consideration? A. I got a release from all obligations. Q. A release from Sir William Howland? A. Yes. Q. Did you get a release from the creditors? A. No. Q. Do you know whether Sir William Howland has paid them? A. I believe he has. Q. If he has not you are still liable because they have not released you? A. I don't know how that is in law. Q. I am asking you as to the facts? A. We did not owe anything, except to the bank, only a few hundred dollars; that has been settled; and I understand the bank has been settled with. Q. Has the bank told you that? A. No, *I understood* it from Sir William Howland, that the account of Howland, Jones & Company was *settled*. Q. I suppose if you are still liable you are responsible of course? A. That is a question. I am not responsible for all Howland did not pay. Q. You don't know only from what he has told you whether he has paid or not? A. *I think* I have heard Mr. Lacing say the

bank matter had been *settled* as far as Howland and Jones were concerned. Q. There were other creditors besides that? A few in the town, but they did not amount to anything. Q. How much? A. Three hundred dollars perhaps would settle the whole thing.

MR. KERR.—That was all paid? A. I believe it was all paid. Q. No person has any claim against you in connection with that? A. Not that I know of.

It would seem clear that the statements as to what he was told by Sir William Howland, and what he says he thought he heard from Mr. Lacing, were not evidence; and that without these statements there is no evidence that the indebtedness to the bank has been paid.

If this was a fact, which was required to be shewn or in any wise material, it is clear on the authority of *Regina v. Gibson*, 18 Q. B. D., 537, that the admission of such evidence is illegal—i. e. not legal evidence—would be fatal to the conviction. The head-note of that case is, "In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury and they find him guilty, the conviction is bad, and this notwithstanding that there was other evidence before them, properly admitted and sufficient to warrant a conviction."

In that case it was laid down that it was the duty of the Judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows.

Matthew, J., said, "We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not."

We are not informed by the evidence, what the amount of the indebtedness to the bank was.

The case presents itself to my mind as follows:

Jones went out of the firm relying upon Howland's ability to pay the debts of the firm. He had no release from the creditors, and therefore had a pecuniary interest in having those debts paid. For all that appears the liability to the bank may have been a very large sum, and the assets of the firm barely sufficient to met them; and it may be of moment whether the assets be diminished by

the amount of the cheque in question or by the sum of \$1,000 portion thereof. If the cheque was not forged but the money misappropriated, the firm's assets were lessened by the amount drawn. If the cheque was altered or "raised," it may be that the bank cannot charge the firm with the cheque or the sum of \$1,000 over and above the \$400, for which it was originally drawn.

I am quite unable to say that Jones had no interest, or that the legal evidence removed the presumption of interest that was raised by his connection with the firm at the time the cheque was drawn.

On the case as stated, we have not the charge of the learned Chief Justice. I am unable, therefore, to see how the case was left to the jury. If the jury were directed that Jones's evidence did not require corroboration, then it becomes immaterial to consider the third question, as a verdict founded upon such a direction could not be supported—if in fact, and in law Jones was an interested witness and required corroboration.

It may be that the case should be amended so as to bring the charge before us to enable us to ascertain how the fact was.

On the case as stated we must assume that the learned Chief Justice charged the jury, that no corroboration was required; and in this I think there was error, and therefore that the conviction should be quashed.

Conviction affirmed.

[CHANCERY DIVISION.]

KIRK ET AL. v. BURGESS ET AL.

Receiver, by way of equitable execution—Incumbered lands—Rents—R.S.O. ch. 65.

Under the Judicature Act the Court has power to award equitable execution after judgment in any and every case where it is just and convenient to do so. Where writs of execution had issued, but had not become exigible against the lands (subject to mortgages) of a judgment debtor possessing no personalty, and who was collecting the rents and paying other creditors, a receiver of the property was appointed by way of equitable execution to collect the rents, subject to the rights of the mortgagees, and to apply them for the benefit of creditors under the Creditor's Relief Act.

In such a case the receiver should be an officer of the Court.

THIS was an application by way of petition on the part of the plaintiffs in a suit of H. B. Kirk & Co. against Colin Burgess and Alexander Burgess, for the appointment of a receiver to collect rents, and apply them towards the payment of the plaintiffs' judgment.

It appeared that the plaintiffs had recovered judgment against the defendant, Colin Burgess, and had issued execution to the sheriff: that the said defendant had no goods or chattels, but was the owner of several houses, subject to mortgage incumbrances, the rents of which were being collected by his agent, and the surplus, after paying the annual charges on the properties, was being applied to other purposes than the payment of the plaintiffs' judgment. The defendant was indebted to other persons, but there were no other judgments against him.

The petition came on for argument on March 21st, 1888, before Boyd, C.

H. Cassels, for the petitioner. The evidence shews that the defendant Colin Burgess is entitled to an annual income from the surplus of the rents and that he is applying it to his own uses and refusing to pay the plaintiffs'

debt. The plaintiffs are entitled to be paid, but the defendant disregards the Court's judgment. This is just such a case as is covered by R. S. O. ch. 44 sec. 53, sub-sec. 8. It is both just and convenient that a receiver should be appointed to collect the rents and pay the plaintiffs' judgment: *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275. [BOYD, C.—I suppose there is no doubt the Court has power to order equitable execution.]

Tilt, Q.C., contra. The plaintiffs are only entitled to the usual remedy, viz., execution on their judgment. There is no obstacle here to the execution. Even an equitable interest can be seized and sold. The statute, however, by a wise provision in the case of judgment debtors, gives them a year before their lands can be sold. If a receiver is appointed such appointment would deprive the defendant here of his statutory right. There is nothing in this case to prevent the defendants interest in the lands being reached and sold in the usual way. I also refer to *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.

Cassels, in reply. [BOYD, C.—Do you contend that in every case where the year is running a receiver should be appointed?] If the debtor is acting as he is in this case, viz., disregarding the judgment of the Court, applying the rents to his own use, and paying other creditors to the exclusion of the plaintiffs who have a judgment. See *Bryant v. Bull*, 10 Ch. D. 153, and *Tillett v. Nixon*, 25 Ch. D. 238.

April 9, 1888. BOYD, C.—Equitable execution is a mode of obtaining payment of a judgment debt by the appointment of a receiver of property of a defendant, which the sheriff is by reason of the imperfection of the statutes respecting executions unable to reach or deal with. In this case the application is to intercept rents which might be garnished if they were overdue. Otherwise they are not available to the execution creditor. True he may sell the land out of which they issue, but this cannot be done forthwith, and besides the rent is an available asset distinct from the land itself out of which it issues. The

land is encumbered and the receiver should be appointed without prejudice to the rights of the mortgagees.

The right to award equitable execution by the appointment of a receiver rests on the provisions of the Judicature Act which are fully considered in *Salt v. Cooper*, 16 Ch. D. 544. We have adopted those sections which have been construed to justify the practice of appointing a receiver, after judgment, as is sought on this application. See also *Walmsley v. Mundy* 13 Q. B. D. 811.

It was contended that the order should not be made in this case because the plaintiff was not without remedy as he could sell the equity of redemption under his execution; but that contention is answered by the judgment of Cotton, L. J., in *Re Pope*, 17 Q. B. D. 749, which shews that though other and ordinary remedies by way of execution are open, yet the Court has power to award equitable execution in any and every case where it is just or convenient so to do. The question is one not of jurisdiction but of discretion, and if the Court sees that any good end will be served by appointing a receiver it will so order. See also *In re Coney—Coney v. Bennett*, 29 Ch. D. 993, and *Westhead v. Riley*, 25 Ch. D. 413; *Wills v. Luffe*, 32 Sol. J. 338.

The judgment debtor has appointed an agent who is collecting the rents of his houses and applying them to pay certain of his creditors. It is a more equitable course to have an officer of the Court as receiver, collect and apply them for the benefit of the plaintiff and other creditors entitled under the provisions of the Creditor's Relief Act, R. S. O. 1887, ch. 65.

The costs of this application are to be paid out of the rents in priority to other claims; if not so realized to be added to the judgment debt. The usual form of order as adopted in English practice will be found in *Hewett v. Murray*, 52 L. T. N. S. 380. It may be right to appoint the sheriff as receiver, but he may have to give security before acting, as his ordinary suretyship may not extend to these moneys.

[CHANCERY DIVISION.]

RE THE CENTRAL BANK OF CANADA AND THE
WINDING-UP ACT, CH. 129 OF R. S. C.

WELLS AND MACMURCHY'S CASE.

Corporation—Banks and Banking--- Winding-up Act, R.S. C. ch. 129—Deposit made in Bank the day of suspension—Recovery of same back—Fraud.

Where a deposit was made in a bank, and it was shewn that at a director's meeting, held the previous day, the necessity of seeking outside assistance or suspending payment had been considered and a resolution passed to suspend payment if such assistance were refused, and that when the bank closed on the day the deposit was made, it did not open again, and notice of suspension of payment was given on the following morning, *Held*, that the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, and the liquidators were ordered to pay the same with interest from the date of the deposit.

Quære, whether motion by petition was the proper mode of procedure in a case like this.

THIS was an application, on petition of Rupert Mearse Wells and Angus MacMurchy, for an order directing the liquidators of the Central Bank of Canada, which bank was being wound up under R. S. C. ch. 129, to repay the sum of \$13,409.39, the amount of a cheque deposited in the bank the day before it closed its doors, on the ground that it was a fraud to receive it after it was known that the bank was insolvent, under the circumstances disclosed in the judgment.

The petition was argued on 7th March, 1888, before MacMahon, J.

S. H. Blake, Q.C., appeared for the petitioners, and contended that this was not the ordinary case of debtor and creditor, but that the depositors had elected to prevent that relation arising by stopping payment of the cheque before it could be collected in the ordinary way and credited to them, and until this was done such relation could not possibly arise, and that the concealment of the bank's financial position after the passing of the directors'

resolution to suspend (quoted in the judgment) was a fraud on the petitioners as well as the public.

Foster, Q.C., appeared for the liquidators, and contended that the repayment of the sum in full after being collected, no matter in what way made, would be a preference as against the other creditors of the bank.

April 25, 1888. *MACMAHON*, J.—This is a motion on a petition presented on behalf of Messrs. Wells & MacMurchy praying that the liquidators of the Central Bank be directed to pay back to them the sum of \$13,409.39 and interest, from the assets of the bank, which the petitioners allege was received or obtained by the bank from them by fraud.

The petitioners, on the 15th day of November, 1887. deposited in the Central Bank, for collection, a cheque drawn by the Canadian Pacific Railway Company on the Bank of Montreal, at Montreal, for the said sum of \$13,409.39 payable to the order of Wells & MacMurchy, which was immediately presented by the Central Bank for payment at the Toronto branch of the Bank of Montreal, and the cash obtained therefor.

The petitioners state that they believed the Central Bank to be perfectly solvent at the time of making the deposit.

On the evening of the 14th of November (the day previous to Wells & MacMurchy making the deposit) the directors of the bank met and received from the cashier the following statement as to the position of the bank's affairs, as extracted from the minutes:

"The cashier stated that a crisis in the affairs of the bank had arisen, owing to the fact that the assets could not be realized upon speedily enough to meet the demands, and that unless assistance was forthcoming from some of the other banks it would be necessary to suspend payment."

On the receipt of this information, and on the same evening, the board passed the following resolution:

"After due consideration, the cashier was authorized to apply to the other banks for assistance to the extent of

\$200,000, or \$250,000, securing the same by paper or securities held by the bank, and in case of refusal it was ordered that the Central Bank suspend payment for 90 days or for such less period as the board may fix, to enable the securities to be realized on, issuing the following notice.

‘In consequence of the present money stringency the Central Bank has not been able to realize on its assets promptly enough to meet immediate demands upon it. It has therefore suspended payment.’

In case such application for assistance be granted conditional on an investigation into the affairs of this bank by the representatives of such banks, that the same be refused.”

On the 16th November at a meeting of the directors the following was entered on the minute book.

“The cashier reported the substance of his interview with the representatives of several of the other banks asking for assistance to the extent of \$200,000 to \$250,000: that the banks declined, and that in accordance with the resolution passed at the last meeting, this bank has suspended payment, and that notice has been posted accordingly:”

The bank suspended payment and did not open its doors on the morning of the 16th of November, and made the following announcement as the cause of its suspension.

“In consequence of the present money stringency the Central Bank has not been able to realize on its assets promptly enough to meet immediate demands upon it. It has, therefore, for the present, suspended, payment.”

The said cheque was deposited in the Central about a quarter past twelve o'clock, and about half past five o'clock in the afternoon of the same day, Mr. MacMurchy, one of the petitioners, in his affidavit in support of the petition, states that he learned that a report was current affecting the Bank and at once endeavoured to stop payment of the cheque through the head office of the Bank of Montreal, in Montreal, and from there ascertained that the cheque had been paid to the Central by the Toronto

agency of the Bank of Montreal on the day it had been deposited.

On the motion the affidavit of A. A. Allen, the late cashier of the Central Bank, was read, in which he states that he remembered the deposit, by the petitioners, of the cheque referred to, and that it was immediately presented to the Toronto branch of the Bank of Montreal, and paid by them to the Central Bank, and had it not been for the proceeds of the said cheque the said bank would not have been able to remain open and meet its obligations to the other banks in Toronto on the 15th of November, but would have been compelled to close its doors without discharging such obligations. He also states that he has no hesitation in saying that the Central Bank was insolvent on the 15th of November.

Robert H. Bethune, general manager of the Dominion Bank, B. E. Walker, general manager of the Bank of Commerce, Henry S. Strathy, general manager of the Traders Bank, and George W. Yarker, manager of the Federal Bank, all of whom were present at a meeting held on the 15th November when the Central applied for assistance to the extent of \$200,000 or \$250,000 in accordance with the resolution passed by the directors on the previous day, were examined as witnesses on this motion.

The meeting was unanimous in refusing to grant the assistance desired in the face of the resolution passed by the board of the Central not to permit an investigation of the affairs of the bank to be made.

One of the bank managers stated in his evidence that the Central had taken the right course to secure a refusal of its requests, and the disclosures since made to the Court regarding the state of the bank shew that at the time of the suspension it was hopelessly insolvent—a condition of affairs known to the cashier, and which must have been known to the directors when passing the resolution refusing to permit an investigation.

“Collection upon cheques * * is a duty very commonly undertaken by banks on behalf of their customers.

Collection upon cheques is probably a universal necessity of the business * *. After the collection has been made, the bank becomes a simple contract debtor for the amount, less the commission, if any has been charged :” *Morse on Banks and Banking*, 2nd ed., 384.

The cheque in question having been handed to the bank to be forwarded to Montreal for the purpose of collection ; until the cheque was actually paid by the bank upon which it was drawn, it is doubtful if the Central could treat Wells & MacMurchy as its creditors until the collection had been made by such actual payment. That, at least, would be the position of the bank and the petitioners, were the latter not customers of the bank and were not making a deposit in the ordinary way so as to vest the title in the cheque in the bank, and thus enable the depositors to draw against the credit obtained by the deposit of the cheque.

However, the question to be decided in this case is not whether the cheque was handed to the bank for collection or for deposit, and so to pass to the credit of the depositors ; but whether there was such fraud on the part of the Central Bank in receiving the cheque as entitled Wells & MacMurchy to rescind the contract and recover the amount from the bank.

The case of *Cragie et al. v. Hadley*, 99 N. Y. Court of Appeal 131, is very similar in its facts to the present case. In the judgment of that case at p. 134 it is stated : “ The drafts for the proceeds of which this action is brought, amounting to \$14,793.37, were deposited by the plaintiffs in the usual course of business, with the first National Bank of Buffalo, between two and three o’clock in the afternoon of the 13th day of April, 1882, and were credited in the plaintiffs’ pass book and on the books of the bank, to their account. The bank closed its doors at the usual hour on that day and never opened them afterward. It turned out that the bank was irretrievably insolvent owing debts to the amount of \$1,300,000 with assets not exceeding in value forty per cent. of its debts, and had been so insolvent for months before its failure. It does

not admit of question that the condition of the bank was such that if it was known to its officers or agents charged with the direction and management of its affairs, a gross fraud was perpetrated on the plaintiffs in permitting them, in reliance upon its supposed solvency, to make the deposit in question. The bank was not only irretrievably insolvent, but it had apparently given up the struggle to maintain its credit before the deposit was made. Its drafts had gone to protest on the 12th, and it was manifest that a condition of open insolvency must immediately ensue. The acceptance of the deposit under those circumstances constituted such a fraud as entitled the plaintiffs to reclaim the drafts or their proceeds. (See *Anonymous Case*, 67 N. Y. 598)."

It was urged by counsel for the liquidators that the petitioners were not entitled to receive the amount claimed as proceeds of the cheque, as it would be a preferential payment and therefore void as against the creditors of the insolvent bank under 45 Vic. ch. 23 sec 74, (D.)

That question was discussed in the case of *Cragie v. Hadley, supra*, where it was claimed that the plaintiffs were precluded from reclaiming the drafts, or their proceeds, by sections 5234 and 5242 Revised Statutes of the U. S., which forbid all preferential payments or transfers by an insolvent bank, and provide for a rateable distribution of its assets among its creditors.

The Court in giving judgment on the point thus raised says at p. 135: "The answer to that is, that the plaintiffs do not claim under a transfer from the bank, but under their original titles. They are not seeking to enforce any right as creditors of the bank, but to reclaim their own property obtained by fraud. Their relation as creditors terminated when they elected to rescind the contract. The right to a restoration in such case may be defeated by the acts or acquiescence of the defrauded party, or because the property has lost its identity and cannot be traced, or other persons have innocently acquired interests in ignorance of the fraud. But neither the creditor of the insolvent bank,

nor its assignee in bankruptcy, has any equity to have the plaintiffs property applied in payment of the obligations of the bank, and the statute does not sanction so palpable an injustice."

See also *Exchange Bank of Canada v. The Montreal Coffee House Association*, 2 Montreal L. R. Sup. Ct. 141, where it was held that under 45 Vic. ch. 23, sec. 74 (D.), that a deposit of money made with a bank on the day when it suspended payment may lawfully be returned to the depositor. See also *Dodge v. Mastin*, 17 Federal Reporter, 660.

I refer to *Clough v. London and Northwestern R. W. Co.*, L. R. 7 Ex. at p. 35, and *Morrison v. The Universal Marine Ins. Co.*, L. R. 8 Ex. at p. 205 as to what constitutes a rescission.

I think Wells & MacMurchy, are entitled to be repaid the \$13,409.39 obtained from them by the bank through fraud, and I order the liquidators to pay the same together with interest from the 15th November, 1887.

I have been in doubt whether the motion by petition is the proper mode of procedure but there has been no objection made on that ground.

G. A. B.

NOTE.—On a subsequent day an application for costs was made on behalf of the petitioners, which was granted.—REP.

[CHANCERY DIVISION.]

BANKS ET AL. V. ROBINSON ET AL.

Sale of goods—Agreement to sell—Property not to pass—Stipulation for taking possession—After-acquired property—Registration—R. S. O. c. 125.

J. R. by an instrument in writing, agreed to sell his business and stock-in-trade to his sons and by it provided that all the existing stock was to remain his property until it was paid for; that all after-acquired property brought in by way of substitution for existing stock, was to become his property by way of security for the purchase money, and that on default he should have the right to re-enter and take possession. Some seven years afterwards, default having been made, he took possession and began selling off by auction. The sons then made an assignment for the benefit of creditors. In an action brought by the assignee and some creditors of the sons to restrain J. R. from selling. It was *Held*, that the legal operation of the instrument of sale was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made, and possession taken before the rights of the assignee or of any execution creditor arose, that act clothed J. R. with the legal title in the afteracquired goods, which was not affected by the assignment for creditors subsequently executed.

Held, also that the instrument did not need to be registered to make it operative, against subsequent creditors: the Bills of Sale and Chattel Mortgages Act, R. S. O. ch. 125 not covering the case of agreements creating equitable interests in non-existing and future-acquired property. The effect of the transaction in this case and the advisability of making provision for giving publicity by registration commented on.

THIS was a motion for an injunction in an action brought by George W. Banks, who was assignee of the firm of Robinson & Brother, and several others, who were creditors of the said firm, against Joseph Robinson, Charles Edward Robinson, and Thomas Andrew Robinson, the last two being the persons who composed the said firm.

It appeared that the said Joseph Robinson when carrying on business in watches, jewelry, and fancy goods, in the city of Toronto, in his own name under the trade sign and at the store commonly known as "The Sheffield House" agreed to sell the said business and the stock-in-trade to his two sons the defendants Thomas Andrew Robinson and Charles Edward Robinson, by an agreement in writing dated May 29th, 1880, and in said agreement amongst other things were the following provisions:

“ And it is hereby agreed and declared by and between the parties hereto that the property in or ownership of the said goods, wares * * hereby agreed to be sold, or in or of any part thereof, shall not pass to the said Thomas Andrew Robinson and Charles Edward Robinson * * but shall be and remain in the said Joseph Robinson * * until the said sum of \$40,000 and all interest which shall have accrued thereon and all other moneys payable under or by virtue of this indenture, and every bill, note, * * given or to be given for the same or any of them or any part thereof, shall have been fully paid and satisfied. The said Thomas Andrew Robinson and Charles Edward Robinson and the survivor of them * * are nevertheless to have immediate possession of all the said goods and other the said premises hereby agreed to be sold, and are to be at liberty to use, dispose of, and deal with the same in the usual course of business as the same has been heretofore carried on by the said Joseph Robinson, so long as there shall be no default in the payment of the said sum of \$40,000 * *

“ And it is further agreed and declared by and between the parties hereto, that until the said sum of \$40,000 and all interest thereon shall have been fully paid and satisfied, the said Thomas Andrew Robinson and Charles Edward Robinson and the survivor of them will carry on the said business * * and will keep the said stock well sorted with new goods from time to time.

“ And it is hereby declared and agreed that the property in all such new goods or any new articles bought by the said Thomas Andrew Robinson and Charles Edward Robinson * * during the continuance of the said debt or any part thereof, to replace goods or articles sold or added to the said stock-in-trade or brought upon the premises where the said business is carried on, in the course of and in connection with the said business, shall immediately upon the same being brought upon the premises where the said business may, for the time being, be carried on, or being deposited in any warehouse in the city of Toronto for the said Thomas Andrew Robinson and Charles Edward Robinson * * become vested in the said Joseph Robinson by way of security for the payment of the said moneys or so much thereof as may remain unpaid, to the same extent and in the same manner as if they the same were now the property of the said Joseph Robinson and composed part of the stock hereby agreed to be sold.

* * * * *

* * that in default of payment of any instalment of principal or interest on the day and time hereby appointed for payment thereof, the whole principal money shall become immediately due and payable, and thereupon the party of the first part (Joseph Robinson) * * may resume possession of the said business, stock-in-trade, and other premises hereby agreed to be sold as aforesaid, and exercise all other rights and powers which he may have or be entitled to in respect of the whole of the said purchase money remaining unpaid.”

Thomas Andrew Robinson and Charles Edward Robinson carried on the said business under the firm name of

Robinson & Brother, and continued under the old trade sign of "The Sheffield House," retaining the said Joseph Robinson in the said store as a kind of confidential manager under a salary.

These relations continued from the year 1880 until it was ascertained that the business was not paying; and default having been made in the payments under the said agreement, Joseph Robinson took possession thereunder, of the stock and premises on January 26th, 1888.

The firm of Robinson & Brother assigned to the plaintiff George W. Banks on the 1st day of March, 1888.

After taking possession, Joseph Robinson began selling off the stock by auction for the purpose of satisfying his claim, and this motion was made for an injunction to restrain him from selling.

The motion was argued on April 18th, 1888, before Boyd, C.

Reeve, Q.C., and Neville, for the plaintiffs. The creditors would not have sold the firm of Robinson & Brother goods if they had not thought they were owners of the business. The evidence seems to shew that although Joseph Robinson had all the advantage of a sale to his sons, still he did not sell, and now claims the whole property under the agreement. If he could so act it would be a fraud. The agreement is not filed or registered, and is a fraud on the creditors as to after-acquired property. It may be contended that the mention of after-acquired property takes it out of the Bills of Sale and Chattel Mortgages Act, but *Coyne v. Lee*, 14 A. R. 503 does not so decide: see judgment of Hagarty, C. J. O. There are English cases which shew the contrary. [BOYD, C.—But English cases depend on the English statute.] The subsequently acquired property became vested in Robinson & Brother and the agreement as to them was either a mortgage or an agreement for a mortgage and required registration: *Ex p. McKay*, 28 L. T. N. S. 828; *Ex p. Hoppcraft*, 14 W. R. 168; *Stevenson v. Rice*, 24 C. P. 245; *Baghott v. Norman*, 41 L. T. N. S.

787. Joseph Robinson's conduct should estop him: *McAllister v. Forsyth*, 12 S. C. R. 1.

James MacLennan, Q. C., for the defendant Joseph Robinson. This motion should be refused. Joseph Robinson's title is beyond question. Neither the assignee nor the creditors have any right to interfere. The instrument vests no property in the vendees. The transaction was *bond fide*. There was nothing wrong in the conduct of the parties. There were no enquiries made by one party and no concealment or misleading statements made by the other. There is nothing in question but the want of registration. Registration was not necessary. The agreement does not come within the Bills of Sale and Mortgages Act. No change of possession was possible so the Act cannot apply, and that opinion was expressed by Mr. Justice Patterson in *Coyne v. Lee*, *supra*. This suit is not properly constituted. The assignee cannot maintain it, and creditors cannot join together for the purpose.

Reeve, Q.C., in reply.

April 26, 1888. *Boyd*, C.—The stock-in-trade being the sole property of Joseph Robinson, he makes an agreement to sell it to his sons in 1880, and as security for the price takes back an instrument by which all the existing stock is to remain his property till it is paid for; and by which all the after-acquired stock which shall be brought in by way of substitution for the existing stock is to be also his property for the purpose of the security. \$40,000 was the price (after making some abatement) and this is still unpaid to a large extent. On account of default in payment Joseph Robinson made an entry on the premises and took possession of all the stock there towards the end of January.

On March 1st the sons made an assignment for the benefit of creditors.

The legal operation of the agreement of 1880 was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be

afterwards acquired. The effect of it is also to give the vendor the right to resume and take possession of the stock, present, and after-acquired, which should be on the premises at the time of entry for default in payment. Possession being taken by the vendor in January, and so far as appears, rightfully and properly taken, that act clothed him with the legal title in the after-acquired goods: *McAllister v. Forsyth*, 12 S. C. R. 1. That legal title is not affected by the assignment for creditors subsequently executed by the sons, who, apart from fraud and the Bills of Sale Act, could only convey what they had i.e., an equity of redemption, subject to the payment of the vendor under his paramount title. The evidence of fraud is too vague and is met by too many rebutting circumstances to justify me at this stage in interfering upon that ground.

As to the other point argued, I think that the instrument did not need to be registered to make it operative against subsequent creditors. It was not contended that it required registration as to goods existing at its date, for the property in these never passed to the vendees, and it was conceded that the doctrine in *Stevenson v. Rice*, 24 C. P. 245 applied, (see also *Ex p. Crawcour*, 9 Ch. D. 420).

But it was urged that *quoad* future stock it should have been registered. Now an agreement as to future chattels gives no legal rights and does not pass the after-acquired property; but in a proper case it can be made effectual on the ground that a Court of Equity will enforce it as a contract, attaching upon that property when it is ascertained: *Clark v. Scottish Imperial Insurance Co.*, 4 S. C. R. 709.

My opinion is, that the Bills of Sale and Chattel Mortgages Act, R. S. O. c. 125, 1887, was not intended to cover agreements creating equitable interests in non-existing and future-acquired property. The Act relates to existing chattels capable of manual delivery and susceptible of full and certain description for the purpose of identification, at the date of the instrument: *McCall v. Wolff*, 13 S. C. R. 130. The English Bills of Sale Act of 1878, 41 & 42 Vic. ch. 31, extends in terms to an agreement "by which a right

in equity to any personal chattels, or to any charge or security thereon, shall be conferred " (sec. 4). The Bills of Sale Act of 1882 avoids bills of sale affecting after-acquired property except in certain particular cases of fixtures and the like (secs. 5 and 6). The effect of this has been held to invalidate a bill of sale which, besides existing goods, purported to include future goods to be substituted for the first: *Kelly v. Kellond*, 20 Q. B. D. 569.

Before this it had been intimated in *Holroyd v. Marshall*, 10 H. L. C. at p. 227 that the sales of future property were not within the Bills of Sale Act of 1854. That was more pointedly decided in *Brown v. Bateman*, L. R. 2 C. P. 272, in reference to an agreement as to building materials, by which they were to be considered when brought upon the landowner's premises as belonging to the same. As against an execution creditor of the builder it was held that this conferred on the landlord a clear equitable right to the materials when brought upon the land, which defeated the execution. It was further held that the instrument did not require to be registered because it was not "an assignment transfer or other assurance of personal chattels" or "a license to take possession of personal chattels as a security for a debt" under the Bills of Sale Act of 1854.

The Act of 1878 may, in the words I have noted, extend to this right in equity as to future chattels, as to which it is of moment to consult the case of *Reeves v. Barlow*, 11 Q. B. D. 610, and affirmed in appeal 12 Q. B. D. 436. (See also *Coyne v. Lee*, 14 A. R. 503, and *McMaster v. Garland*, 31 C. P. 320, and 8 A. R. 1: *Robinson v. Cook*, 6 O. R. 590, and *Kitching v. Hicks*, ib. 739).

But it is not needful further to follow this line of inquiry. There is another and conclusive answer to the applicability of the R. S. O. ch. 125. Before the rights of the assignee or of any execution creditor arose, the title of the defendant Joseph Robinson became perfected by his entry upon and taking possession of the property in question. The matter no longer rests on an executory title, but a title made as complete as if the Court had given specific performance for the

delivery of the chattels. So far as *Barker v. Leeson*, 1 O. R. 114 is against this view, I am of opinion that it ought not to be followed, having regard in particular to the decision of the House of Lords in *Cookson v. Swire*, 9 App. Cas. 653, and that of Mr. Justice Thompson speaking for the full Court in *McLean v. Bell*, 5 Russ & G. (Nova Scotia) 130.

Better to safeguard commercial morality it would be expedient to make provision for giving publicity by registration to dealings such as this. The effect of the transaction (though it may not be contrary to the law) is to protect the credit of a trader who is yet heavily weighted with undisclosed obligations. Grave suspicions must always arise in the minds of creditors whose claims are superseded by some instrument of peculiar character, produced at a period of crisis, by which all the assets of their debtor are secured to a near relative.

It is still open for the plaintiffs to prosecute this action on the grounds of generally fraudulent conduct, which may be gathered from a multitude of circumstances, but this part of the case has not been put before me with such clearness as to call for the continuance of the injunction. So far as preponderance of convenience is concerned it is better to let the sale go on till all is disposed of. About half the stock still remains to be sold. The lease of the premises expires early in May. The defendant who is selling is able to answer financially all claims made upon him for the proceeds of the sales. And upon his undertaking to keep an account, of what is received and expended in the usual way, I dissolve the injunction. Costs to be reserved till further order.

G. A. B.

[CHANCERY DIVISION.]

IN RE THE CENTRAL BANK OF CANADA AND THE
WINDING-UP ACT, CH. 129, R. S. C.

YORKE'S CASE.

Winding up Act R. S. C. ch. 129—Deposit Receipt—Promissory Note—Contributory—Set-off.

Y. in making a deposit on a Government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, and which cheque was subsequently cancelled and a deposit receipt issued by the bank, substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on December 3, 1887, and on January 20, 1888, Y. having been required by the Government to take up the deposit receipt and replace it with other security, took an assignment of the receipt and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set up the deposit receipt against the note as a set-off.

Held, following *Ings v. President &c. of The Bank of Prince Edward Island*, 11 S. C. R. 265, that Y. as maker of the note to the bank was a mere debtor and not a contributory and that although also a shareholder, and so liable as a contributory, he was not a contributory *quoad* the debt which arose out of an independent transaction and for that reason sec. 73 of R. S. C. ch. 129 did not apply.

Held, also that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of *contributories*: as to debtors the law of set-off as administered by the Courts is applicable as if the company was a going concern and following *Re The Moseley &c Coke Co., Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the Government and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior *bond fide* engagement.

THIS was a petition by Lionel Yorke for an order directing the liquidators of the Central Bank of Canada to deliver up a certain note for \$8,000, obtained from him under the circumstances set out as follows:

On and prior to September 2nd, 1886, Yorke kept an account with, and was a customer of the bank, and was also a shareholder therein: on that day he deposited his cheque for \$8,000 on said bank with the Hon. the Commissioner of Public Works for Ontario, as a contract deposit, which cheque was marked good by the bank, and the amount thereof charged to the petitioner's account:

the said cheque was held by the Hon. the Treasurer of Ontario, to whom the Commissioner of Public Works had transferred it, until January 15th, 1887, when an arrangement was made by which the bank issued a deposit receipt to the treasurer for the said sum of \$8,000, subject to withdrawal by the Province, but until such withdrawal the said bank was not to charge Yorke with any interest, and the said cheque was then cancelled: on February 2nd, 1887, in view of the possibility of the Province drawing said money, the bank obtained from Yorke a note for \$8,000 payable on demand, as a voucher for the same: on January 2nd, 1888, the said deposit receipt was assigned by the Province to the petitioner, and notice of said assignment given to the liquidators of the bank, which was then in course of being wound-up under R.S.C. ch. 129; that except as aforesaid no value was ever given for the said note: that the liquidators had threatened to sue the petitioner on said note: and the petitioner although admitting he was a shareholder in the bank claimed to be allowed to set-off said deposit receipt against said note.

It appeared in evidence that the petitioner had been required by the Provincial Treasurer and the Commissioner of Public Works to take up the said deposit receipt, and give other security in its place, because the bank had gone into liquidation.

The petition was argued on April 18th, 1888, before Boyd, C.

Snelling, for the petitioner. The petitioner is entitled to set off the deposit receipt against the note: R. S. C. ch. 129, sec. 57. The statute provides that the bank is to be wound-up as a going concern "as if the business of the company was not being wound-up": *ib.* [BOYD, C.—How does this matter now come before the Court? Why does the petitioner not plead "set-off" when action brought?] No action has been brought and it was to get the opinion of the Court in a less expensive way that a petition was

presented, the other side not objecting. The evidence shews that the petitioner did not purchase the deposit receipt for the mere purpose of set-off, even if that would have made any difference. He was compelled by the Provincial Treasurer to take it up and replace it with other security, through no default of his own. I refer to *Ings v. The President, &c. of the Bank of Prince Edward Island*, 11 S. C. R. 265, and cases there collected: *Hawkins v. Whitten*, 10 B. & C. 217; *Mangles v. Dixon*, 3 H. L. C. 702, at p. 710, where it is laid down "the contract out of which the set-off arose was part of the same transaction which created the debt assigned: *Smith v. Parkes*, 16 Beav. 115. It is a material consideration and circumstance that the debts have the same origin: *In re Agra and Masterman's Bank*; *Anderson's Case*, L. R. 3 Eq. 337.

Foster, Q. C., contra. At the date of the winding-up order (December 3rd, 1887) no right of set-off existed as between the petitioner and the bank. He was then liable to the bank on the note which he had discounted with the bank, and the deposit receipt which is a non-negotiable instrument was payable to and held by the Government, and was not vested in the petitioner until after the issue of the winding-up order. The Government on its own account changed the cheque into a deposit receipt, and the transaction became a discounted note to cover the amount of the receipt, each independent of the other. Section 57 of the Winding-up Act does not apply except to cases as they stood at the commencement of winding-up proceedings. If the bank had paid the Government while the latter held the receipt the amount could be recovered back as a preferential payment. Can the petitioner by acquiring title after insolvency and order to wind up get payment in full? The evidence shews that was his object in getting it. Our Insolvent Act 38 Vic. ch. 16, sec. 135, forbade purchase of claims for set-off. The petitioner is a shareholder, and so a contributory, and cannot purchase a claim to set off, R. S. C. ch. 129, sec. 73. The whole administration of the bank's assets is now in Court by virtue of the wind-

ing-up proceedings, and the Court will protect the creditors, and will not allow to be done indirectly what could not have been done directly. The cases under the Bankruptcy Acts furnish proper analogies. I refer to *Deacon's Law of Bankruptcy* 908; *In re Milan Tramways Co.—Ex p. Theys*, 25 Ch. D. 587; *In re United Ports Ins. Co.—Ex p. Aetna Ins. Co.*, 25 W. R. 580; *Clarke on the Insolvent Act of 1875*, 351; *Healey's Joint Stock Companies* 561; *Thompson's Liability of Stockholders*, 386; *The Venango National Bank v. Taylor*, 56 Pa. 14; *Macbeth v. Smart*, 14 Gr. 298; *Field v. Galloway*, 5 O. R. 506, *Rose, J. Buckley on the Companies Acts*, 4th ed. 255; *Mason v. Macdonald*, 45 U. C. R. 113; *The Exchange Bank of Canada v. Burland*, 8 Leg. News. 18.

Snelling, in reply. Bankruptcy law does not apply here. That is applicable to closed concerns. The Winding-up Act in question here applies to a going concern. See *Clark v. Cort*, Cr. & Ph. 154; *Williams v. Davies*, 2 Sim. 461.

April 26, 1888. BOYD, C.—The Dominion Winding-up Act defines “contributory” as meaning a “person liable to contribute to the assets of a company” under that Act, R. S. C. ch. 129, sec. 2 (f). This language is borrowed from an identical definition in the (English) Companies Act of 1862 (25 & 26 Vic. ch. 89, sec. 74.) In a later section of the Act (sec. 200) relating to unregistered companies it is enacted that “in the event of such a company being wound-up every person shall be deemed to be a contributory who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company,” &c. These definitions are *in pari materia*, and as to both it has been held that they do not include the case of a mere debtor who is a stranger to the company, but contemplates only one who is liable to contribute in the character of a partner or member. The Dominion Act by its internal evidence shews that while a contributory is regarded as a debtor, it is not every debtor that is to be classed as a contributory.

Section 19 implies that contributories are limited to persons who are shareholders or members (by comparing sub-secs. 1 and 2). Sec. 33 speaks of "any contributory or other debtor or person apprehending liability to the company," and sec. 50 likewise refers to "any contributory, purchaser, or other person from whom money is due to the company." Sec. 90 also distinguishes between a contributory and a debtor to the company.

I think there is an error in the 47th sec. of the Canadian Act in introducing the word "as" in the third line between "contributories" and "trustee"; in other respects it is a literal transcript of the English Act of 1862, sec. 100. Assuming this to be an error, then the scope of the term "contributory" appears to be no greater in this colonial Winding-up Act than in its English original: *The Canadian Pacific R. W. Co. v. Robinson*, 14 S.C. R. 122.

It was, however, taken for granted by the Supreme Court that a person in the position of the present applicant (*i. e.* who had made a note to the bank) was a mere debtor, and not a contributory: *Ings v. The President &c. of the Bank of Prince Edward Island*, 11 S. C. R. 265. It does not appear to me that such a holding can be successfully contested. It was decided by the Supreme Court that the fact that a debtor is also a shareholder of the bank, and so liable as a contributory does not make him a contributory *quoad* the debt which arises out of an independent transaction. Such is the present case, and for this reason the 73rd section of the Dominion Act does not apply as was argued by the respondents. Of English cases as to the construction of "contributory," it is enough to refer to: *In re Shields Marine Ins. Co.*, L. R. 5 Eq. 368; *In re Hoylake R. W. Co.—Ex p. Littledale*, L. R. 9 Ch. 257, and *In re European Arbitration Acts—Ex p. Liquidators of the British, &c., Association*, 8 Ch. D. 679, 708. *In re National Savings Bank Association*, L. R. 1 Ch. 551, shews that sec. 44 of the Dominion Act affords the clue to the right interpretation of the term "contributory."

The next question is, Can the petitioner, being an ordinary debtor, as against the note made by him and held by the liquidators, set off the deposit receipt made by the bank? The note was originally given for that sum which the deposit receipt represents, and substantially the two securities were but the different sides of the same transaction. There is inherently a persuasive equity to set off one against the other. It is to be observed, also, that the possession of the deposit receipt obtained since the winding-up by the petitioner was not a voluntary acquisition for the purpose of enabling him to claim a set-off. He was compelled to take it back from the hands of the Provincial Treasurer with whom it was deposited as security for the performance of a Government contract undertaken by the petitioner, and to substitute therefore unexceptionable securities. He was thus potentially possessed of it before the insolvency of the bank, for he had made no default in the execution of his contract.

The objection was urged that the right of set-off must, under sec. 58 of the Dominion Act, exist at the commencement of the winding-up, as is the rule in England, derived from the Bankrupt Acts and applied to winding-up proceedings: *In re Gillespie—Ex p. Reid & Sons*, 14 Q. B. D. 963. But secs. 57 and 73 of the Dominion Act have been derived from the Insolvent Act of 1875 (Can.) 38 Vic. ch. 16, secs. 107 and 135, with some modifications, and the implication from the alterations made would rather be against this contention. The prohibition against acquiring debts for the purpose of set-off is limited to the case of contributories: as to the debtors, the law of set-off administered by the Courts is applicable in the same manner, and to the same extent as if the company was a going concern. As I read the dictum of Strong, J., in *Ings v. The President, &c., of the Bank of Prince Edward Island*, 11 S. C. R. 271, he does not regard the Act as imposing any such restriction as that the debt to be set off must be procured before the winding up order. He says: "There is nothing in the statute depriving a debtor of the bank, sued upon a promis-

sory note, from purchasing a negotiable instrument upon which the bank is liable, and setting it off; and a person who may happen to be a contributory, stands in no worse position in this respect than any other debtor of the bank."

But however this may be, there are distinct equitable considerations in this case which remove it from any line that might otherwise be drawn at the date of the commencement of the winding-up. As put by Fry, L.J., *In re West of England and South Wales District Bank—Ex p. Branwhite*, 27 W. R. 646, and 40 L. T. 652, "equitable set-off arises where there are certain equitable circumstances which give a right to the person who sets them up against his opponent."

The principle acted on in *Barrett's Case*, 4 DeG. J. & S. 756, and 13 W. R. 559, applies here. One who was a surety before the winding-up order paid off the debt of his principal after the winding-up, and received the securities of the principal creditor, among which was a promissory note of the company being wound-up. Lord Westbury held that he was entitled to set off that note against his own liabilities to the company. He regarded such a surety as entitled to occupy the same situation as if he had, in respect of his suretyship, paid off the debt before the winding-up order; for he was bound to pay it off when required by the creditor, and so the right of set-off arose virtually not by reason of dealings subsequent to that order, but of dealings prior thereto.

That appears to represent pretty much the position of this petitioner. His engagement was to give security to the satisfaction of the Government, and in taking up the deposit receipt now in question, and supplying better security, he was only fulfilling that which he was obliged to do by a prior *bond fide* engagement; and it is the very failure of the bank which puts into operation that prior obligation.

Nothing was said about costs; it does not appear to me to be a case for costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

CLARKSON v. THE ATTORNEY-GENERAL OF CANADA.

Revenue—Customs duties—Lien of Crown—Writ of extent—Preference of Crown over subject—R. S. O. (1887) c. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 Vic. ch. 26 (O.), and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the customs department, B., on giving security therefor to the Crown, had sold, before the assignment, certain other coal, imported by him, without first paying the duty upon it.

Held, 1. That there was nothing in the Customs Act, R.S.C. ch. 32, nor in law, giving the Crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him.

2. That the issue of a writ of extent by the Crown against B. on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the Crown nothing, so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff.

3. That the claim of the Crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors: the principle that when the right of the Crown and the subject come into competition that of the Crown is to be preferred, in any case has now no existence in Ontario, because the effect of R. S. O. (1887) c. 94 is to do away with any distinction between debts due from the subject to the Crown and debts due from the subject to the subject, and to place them all upon the same footing.

Such principle, although it has been applied to winding-up proceedings instituted under statutes in which the Crown is not bound, and where the property was not divested out of the Crown debtor, is not applicable to estates in bankruptcy or assigned in trust for creditors.

PRIOR to the 3rd February, 1887, Patrick Burns was a coal merchant doing business in the city of Toronto. On that day, being in insolvent circumstances, he made an assignment for the benefit of his creditors of all his estate and effects, pursuant to the Ontario Statute 48 Vic. ch. 26 (O.) to the plaintiff, who immediately entered into possession. Burns, with the permission of the customs department, was in the habit of selling coal without first paying the duty upon it, periodical settlements between himself and the department being made. There was owing by Burns to the customs department at the time of his assignment in respect of duty upon coal previously sold and disposed of by him \$7,461.40; and there were quantities of coal

remaining stored in Burns's coal yards in Toronto, the customs duties on which had not been paid. The yards were bonded warehouses and proper bonds to secure payment of duties had been given. The customs authorities, after the making of the assignment, claimed a lien on behalf of the Crown upon the coal stored in the yards for the whole amount of the \$7,461.40, and demanded payment of this sum from the plaintiff as assignee of Burns, before the coal should be dealt with. The customs authorities claimed in the alternative that, if not entitled to a lien, they were at all events entitled to payment in priority to the ordinary creditors. The plaintiff refused to recognize such claims, or to pay the amount save in the way of dividends upon the estate, as in the case of ordinary creditors. He, however, recognized the right of the Crown to be paid in full the duty upon the coal in the yards at the time of the assignment.

An agreement was entered into between the plaintiff and the collector of customs at Toronto, on behalf of the Crown, on the 26th March, 1887, in pursuance of which the sum of \$7,461.40 was paid by the plaintiff into a chartered bank to the joint credit of the plaintiff and the collector, the agreement being that if certain questions with regard to the lien and priority claimed by the Crown should be decided in favor of the plaintiff, the money should be paid over to him, and the Crown should rank on the estate of Burns as ordinary creditors; but if the questions should be decided in favor of the Crown, then the money should be paid over to the collector. It was also agreed that the Crown was to stand in the same position, without actually issuing a writ of extent, as if such writ had been issued on the 19th of February, 1887; and that the plaintiff was to stand in the same position, without having actually paid the duties on the coal on hand, as if such duties had been paid prior to the issue of the writ of extent, and as if the Crown had thereafter refused to deliver up such coal to the plaintiff, claiming a lien thereon for the \$7,461.40.

This action was then brought, and by a special case submitted, the Court was asked to pronounce upon the questions in dispute, as set out in the agreement referred to. These questions were as follows :

(1) Had the Crown a lien on the coal in the yards at the date of the assignment for the sum of \$7,461.40, or any part thereof ?

(2) Has the Crown a preferential claim upon the estate of Burns in the hands of the plaintiff as assignee, for the said sum ?

(3) Would the Crown have been able to recover from the plaintiff, or from the estate in his hands as such assignee the whole amount of \$7,461.40, had a writ of extent been issued on the 19th February, 1887, against Burns to enforce payment of the said sum ?

(There was a fourth question, whether certain consignees of coal were or were not liable to the Crown for duties on coal imported by Burns and consigned to others, but this was not pressed by counsel for the Crown).

April 27, 1888, the case was argued before Armour, C. J., in Court.

Lush, Q. C., for the plaintiff. (1) The Crown has no lien upon any goods except those on which duty is payable : The Customs Act, R. S. C. ch. 32, especially secs. 220, 245 ; *Attorney-General v. Walker*, 25 Gr. 233 ; *Merchants Bank v. The Queen*, Cassels' Sup. Ct. Dig. 365 : *Re Day*, McClelland Ex. 384 ; *Attorney-General v. Trueman*, 11 M. & W. 694. Moreover the Crown has accepted a bond for the payment of the duties, and this does away with any right of lien. (2) The Crown has no preferential claim on the estate of Burns : R. S. O. (1887) ch. 94, sec. 2. The distribution of Burns's estate is a mere matter of trust and contract ; it is not a distribution by the Court, or under a statute ; the Act 48 Vic. ch. 26 (O.) does not enable the debtor to make an assignment, but declares that one made shall not be void, and gives the assignee certain powers which the

debtor cannot give him. The rule that the Crown, coming into competition with the subject in winding-up proceedings, has priority, does not apply to this system of distribution. In *Re Henley & Co.*, 9 Ch. D. 469, and *Regina v. Bank of Nova Scotia*, 11 S.C.R. 1, the rule applied, because the distribution was under winding-up statutes. As to the construction of R. S. O. ch. 94 see *Exchange Bank v. The Queen*, 11 App. Cas. 157. (3) The property passed to the assignee on the 3rd February; a writ of extent takes effect only from the time it issues: *West on Extents*, pp. 97-99, 115; *Rex v. Marsh*, McClelland & Young £50; *Rex v. Topping*, *ib.* 544; *Austin v. Whitehead*, 6 T. R. 436. The writ of extent gives no additional rights, but is merely a remedy, like an attachment.

R. S. Cassels, on the same side, referred to secs. 34, 36, and 42 of the Customs Act, R. S. C. ch. 32; 48 Vic. ch. 26, sec. 9 (O.); and *Edwards v. Reginam*, 9 Ex. 628.

Robinson, Q.C., for the Attorney-General of Canada. (1) I concede that a general lien of the Crown on certain goods for duties on other goods can only rest on statutory authority, and no lien is given by the Customs Act except in cases of fraud. I cannot successfully contend that there was fraud in this case. Nor can I successfully contend that the Crown could come in under the writ of extent. (2) The Crown is not seeking to come in under the trust created by Burns; it is seeking to obtain payment in full by virtue of its prerogative right of priority. By simply declaring a trust the priority of the Crown cannot be taken away, *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1, and *Re Oriental Bank Corporation*, 28 Ch. D. 643, shew the prerogative of the Crown. As to the effect of the statute R. S. O. ch. 94, there is no authority one way or the other in this country: *Exchange Bank v. The Queen* was decided with reference to the French law prevailing in Lower Canada. That case shews that a prerogative must be abolished by express words or necessary implication. The Act R. S. O. (1887) ch. 94 does not so abolish the prerogative right to priority. The intention was not to prevent

the Crown having priority, but to prevent trouble about the titles of lands of Crown bondsmen, when the Crown really had no claim, and might never have one. The original of this Act was 29 & 30 Vic. ch. 43; and the preamble of that Act contains a plain misstatement of law: *Chitty on Prerogative*, 293. We are not claiming a remedy against "property," but a right arising by virtue of prerogative.

Wickham, on the same side, referred to *Attorney-General v. Black*, Stu. L. C. App. Cas. 324.

May 18, 1888. ARMOUR, C. J.—The assignment made by Burns to the plaintiff on the 3rd February, 1887, under 48 Vic. ch. 26(O.) vested in the plaintiff by virtue of that Act all the real and personal estate, rights, property, credits, and effects, whether vested or contingent, then belonging to Burns, except such as were by law exempt from seizure or sale under execution.

The coal in the yards of the said Burns at that date, therefore, passed to and became vested in the plaintiff, subject to the duty payable in respect thereof to the Crown.

There is nothing in the Customs Act, R. S. C. ch. 32, nor in law, giving the Crown the right of lien upon the coal so assigned, for duty payable by Burns in respect of the other coal sold and disposed of by him before the said assignment, as set forth in the statement of claim, nor was it seriously contended in argument that any such right existed.

The issue of a writ of extent by the Crown against Burns on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the Crown nothing, so far as the property assigned by Burns to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff.

"The goods of a bankrupt may be taken under an extent, the teste of which is previous to the assignment; for the King is not bound by the Acts relating to bankrupts, (not being named in them) and before assignment the property

is not altered, the commissioners having but a power : but the King cannot take goods actually assigned previous to the teste of the writ, because the property is then absolutely transferred to the assignees."

"Goods assigned by the defendant before the teste of the extent, in trust for his creditors, if the assignment be not fraudulent, cannot be taken; even though the defendant were a trader within the bankrupt laws, and the assignment be an act of bankruptcy, and void as against the assignees": *West* on Extents, 115; *Rex v. Crump*, Parker 126; *Giles v. Grover*, 1 Cl. & Fin. 74; *Regina v. Edwards*, 9 Ex. 32 and 628.

"Now it is quite clear that the Crown can only take under a writ of extent the property of the debtor at the time of the issue of the writ; if the debtor has assigned or transferred his property, of course the Crown cannot take it": *Ex parte Postmaster-General*; *In re Bonham*, 10 Ch. D. 595, 603.

It is claimed, on behalf of the Crown, that the plaintiff must pay the duty payable by Burns in respect of such other coal out of the proceeds of Burns's estate assigned to him, in preference to the claims of other creditors, because it is said that when the right of the Crown and the subject concur, that of the Crown is to be preferred: *Attorney General v. Andrew*, Hardress 24; *Rex v. Allnutt*, 16 East 278; *Quick's Case*, 9 Co. Reps. 129 b.; *Giles v. Grover*, 1 Cl. & Fin. 74.

This principle has been applied in England recently where there was a winding-up under the Companies Act, 1862: *In re Henley & Co.*, 9 Ch. D. 469; *In re Oriental Bank Corporation*, 28 Ch. D. 643; *In re West London Commercial Bank*, 4 Times L. Reps. 446; and *The Attorney General v. Leonard*, 4 Times L. Reps. 479; and in this country where there was a winding-up under 45 Vic. ch. 23 (D.); *Regina v. The Bank of Nova Scotia*, 11 S. C. R. 1.

But neither of those Acts bound the Crown, and the property was not divested out of the Crown debtor by the

winding-up proceedings, but remained in the Crown debtor, and the Crown could therefore by the issue of its process have enforced payment of its debt out of such property.

And I do not find any case in which this principle has been applied where the property has been divested out of the Crown debtor, and has become vested in an assignee or assignees under the bankrupt laws in England, or under assignments in trust for the benefit of creditors.

If this principle had been applicable to claims upon estates in bankruptcy under the bankrupt laws of England, the struggles for priority which have taken place between the Crown, claiming under its extent, and the assignees in bankruptcy, of which *Regina v. Edwards*, 9 Ex. 32 and 628, is an example, would have been wholly unnecessary; and we should not have found Lords Chancellors getting out of bed at night to seal commissions in bankruptcy in order that the property of bankrupts might be vested in assignees before the Crown could issue extents: *Wydown's Case*, 14 Ves. 80.

In *Rex v. Mann*, 2 Str. 750, I find the counsel for the Crown urging the Court to exercise its discretion by not interfering with an extent which had been antedated to give it priority to an assignment in bankruptcy, and saying: "This is a case wherein to exercise that discretion; it appears the Crown is to be over-reached by these hasty proceedings upon the commission, which will have this consequence, to sweep away the effects, and totally exclude the King, who cannot come in and prove his debt upon the commission; and the only fence we had against those quick proceedings was, by testing our writ backward."

There was nothing to prevent the Crown from coming into bankruptcy, and proving its claim as an ordinary creditor, and being treated as such in the distribution of the bankrupt's estate; and it is said in *Manning's Exch. Pr.* 2nd ed. (1827) that the officers of the Crown then frequently proved under the commission: *The Zoe*, 11 P. D. 72.

Under the Bankruptcy Act of 1869 debts due to the Crown were provable by section 31, although the Crown was not named, because by section 49 it was provided that an order of discharge should not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he had obtained forbearance by any fraud, but it should release the bankrupt from all other debts provable under the bankruptcy with the exception of debts due to the Crown, &c.

The Bankruptcy Act of 1883, sec. 150, expressly binds the Crown.

It is said in *Shelford*, 3rd ed., 303, that a debt due to the Crown is preferred to creditors under the bankruptcy, citing *Rogers v. McKenzie*, 4 Ves. 752; but this is erroneous, for the case does not warrant the statement in the text.

If this principle was not applicable to claims upon estates in bankruptcy, I do not see upon what principle it can be held applicable to claims upon estates assigned in trust for creditors; and I am of opinion, therefore, that the claim of the Crown for the duty payable by Burns in respect of such other coal is not payable by the plaintiff out of the proceeds of Burns' property assigned to him, in preference to the claims of other creditors.

I do not think, however, that this principle has now any existence in Ontario, because in my view the effect of the Act R. S. O. (1887) ch. 94 is to do away with any distinction between debts due from the subject to the Crown, and debts due from the subject to the subject, and to place them all upon the same footing; and so far as can be gathered from the passing allusion to it by the Judicial Committee of the Privy Council in *The Exchange Bank of Canada v. The Queen*, 11 App. Cas. 157, that seems to have been the view taken of it by the Judicial Committee.

In my opinion, therefore, the questions submitted must be answered in the negative, and judgment must be given for the plaintiff for the agreed amount, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. ABBOTT.

Canada Temperance Act—R. S. C. ch. 1061, secs. 2 and 103 b.—Police magistrate for one of an union of counties—Jurisdiction.

Having regard to the provisions of sec. 103 b. * of the Canada Temperance Act, R. S. C. ch. 106, as interpreted by sec. 2, an union of counties united for municipal purposes cannot be said to have a police magistrate by reason of one of the counties so united having one; and a conviction by a person commissioned as police magistrate for the county of Dundas for an offence against the Act, committed in that county, being one of the united counties of Stormont, Dundas, and Glengarry, was quashed for want of jurisdiction.

This was a motion to quash a conviction for selling liquor contrary to the provisions of the Canada Temperance Act, and was argued May 23, 1888, before the three Judges of this Division by

A. H. Marsh, for the defendant, and
Delamere, for the complainant.

May 28, 1888. The judgment of the Court quashing the conviction was delivered by ARMOUR, C. J.

It is considered unnecessary to print the judgment in full: the head-note gives the effect of the decision.

* By 51 Vic. ch. 34, sec. 6, (D.), sec. 103 of R. S. C. ch. 106 has been repealed and a new section substituted therefor.

[QUEEN'S BENCH DIVISION.]

REGINA V. BACHELOR.

Canada Temperance Act—Conviction—Information laid after defendant has left jurisdiction of magistrate—R. S. C. ch. 178, sec. 13, construction of.

The words "being within the jurisdiction of such justice" in sec. 13 of the Summary Convictions Act, R.S.C. ch. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the information was laid; and an order *nisi* to quash a conviction for an offence against the second part of the Canada Temperance Act on the ground that the defendant not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information nor to summon the defendant from without his jurisdiction, was discharged with costs.

May 29, 1888. This case in which an order *nisi* to quash a conviction against the second part of the Canada Temperance Act had been obtained, was argued before the three Judges of this Division by

Mackenzie, Q.C., for the defendant, and
Delamere, for the complainant.

May 30, 1888. The judgment of the court discharging the order *nisi* was delivered by ARMOUR, C. J.

It is considered unnecessary to print the judgment in full; the head-note gives the effect of the decision.

[COMMON PLEAS DIVISION.]

BLACK V. THE TORONTO UPHOLSTERING COMPANY.

Evidence—Written contract—“Actual first cost”—Inadmissibility of evidence to alter meaning of.

The defendants, carrying on business in manufacturing and upholstering goods, entered into an agreement in writing with plaintiff whereby he was to manufacture all the upholstered goods sold by them at an advance of 11 per cent. upon the actual first cost of goods made and shipped from Toronto, the per centage to pay cost of packing and shipping the goods, and material used as packing to be charged at actual cost price. Before the agreement was reduced to writing certain estimates were made as to what the actual first cost would be taking material and labour as constituting the cost, and the plaintiff in forwarding some of the manufactured goods adopted the estimates.

Held, that the parties by their agreement had precluded themselves from showing anything inconsistent with the natural meaning of the words “actual first cost,” that such meaning must govern; and that the plaintiff was entitled to recover his percentage thereon.

THIS was an action tried before Galt, C. J., without a jury, at the Toronto Autumn Assizes, 1887.

The defendants were carrying on business in Toronto, manufacturing and upholstering furniture, &c. For certain reasons they entered into an arrangement with the plaintiff, also a manufacturer, doing business in Orillia, to relieve them from such work. An oral agreement was come to in May, 1886, which was to be, and on 1st July, 1886, was finally reduced to writing.

It was as follows :

“This agreement made the 1st day of July, 1886, between the Toronto Upholstering Company of Toronto, (hereinafter called the company) of the one part, and Andrew Black of Orillia, of the other part.

Witnesseth that the company hereby transfers all their manufacturing business to the said Andrew Black, and the said Andrew Black transfers all his good will and connection in his business, including all mail and other orders, (but excepting the business done by him with T. B. Mitchell of the town of Orillia,) to the said company, retaining only the manufacturing as is hereinafter specified.

It is also agreed that the said Andrew Black shall manufacture all the upholstered goods sold by the said company at an advance of 11 per cent upon the *actual first cost* of goods made up and shipped from Toronto. This percentage shall be understood to pay the cost of packing and ship-

ping the said goods, and the hessian used as packing, shall be charged to the Toronto Upholstering Company at its actual cost price.

It is also agreed that the said Andrew Black shall buy all the goods required for the purposes of manufacture, (except such frames as he shall make himself) from the said company; and that the prices charged for such goods shall be understood as the actual first cost, and the actual first cost value of the goods so manufactured for the said company, shall be computed from the prices charged by the said company to the said Andrew Black.

In the event of any loss accruing to the said company from faults in the upholstering of any goods sent to them or their customers by the said Andrew Black, such loss shall be charged to and repaid by the said Andrew Black. As witness, &c.

The plaintiff now claimed his commission on the "actual first cost of the goods."

The defendants said that the parties settled between themselves preliminarily to entering into the agreement what the actual first cost should be; and that the plaintiff was not entitled to recover a percentage upon the *actual* first cost, but only upon the amount agreed upon as the actual first cost.

The learned Chief Justice gave judgment in favour of the plaintiff's contention.

In Michaelmas Sittings, 1887, *Shepley* moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

During the same sittings, *Shepley* supported the motion, and referred to *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Acebal v. Levy*, 10 Bing. 376; *Erskine v. Adeane*, L. R. 8 Ch. 756.

Lount, Q.C., and *Kean* (of Orillia), contra, referred to *Mason v. Scott*, 22 Gr. 592; *Inglis v. Buttery*, 3 App. Cas. 552; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Angell v. Duke*, L. R. 10 Q. B. 174; *Mann v. Nunn*, 43 L. J. N. S. C. P. 241.

March 10, 1888. ROSE, J.—It will be observed that the defendant-company was to supply the materials. It was also to pay the wages through the plaintiff; and the plain-

tiff was charged with the price of materials supplied and moneys advanced for wages, and was credited with the goods furnished at their actual first cost, whatever that may be held to mean, and the eleven or twelve per cent provided for by the agreement.

The contention of the parties at the trial may perhaps be more fairly shewn by the following extract from the notes of evidence.

“ Witness.—I understood actual first cost to mean ; take the frame—the frame, of course, is the foundation of the whole structure—then, we take the springs, and all the other material that enters into the chair or lounge, we will say ; then we add the wages of the men to that. That would shew actual first cost.

HIS LORDSHIP—What were the articles you principally made? A. Mattresses, stands, chairs, parlour suites, and lounges ; the actual first cost was the material that entered into the articles, and the men's wages. Q. And then to that you were to be allowed to add 10 or 11 per cent? A. Yes.

HIS LORDSHIP—Now, Mr. Shepley, will you have any objection to tell me what you contend? Mr. Black says, ‘I was to charge the actual first cost of the thing, and the amount of the wages paid to the men for construction, and I was to be entitled to add to that 10 or 11 per cent.’

Mr. Shepley.—What I add to that is this—I think that is a fair definition of what the actual first cost should be. My contention is, that the parties actually fixed, between themselves, what the actual first cost to be charged was, so many pounds of stuffing, and so on, to each article, and so many yards of material. The parties met together, and fixed the exact value of everything that was necessary in the way of material, to go into the construction of every article to be manufactured by Mr. Black. Then they also fixed the cost of workmanship : a workman can make so many of these things in a day or in a week ; and his day is worth so much ; for instance, they take a student's chair—(shewing to his Lordship a book, giving the stuff used in the manufacture of a student's chair, the upholstering, and so on)—these are the prices which we say ought to be fixed as first cost price. Now, Mr. Black says, those things cost him more than that, more than he thought they would ; that is overlooking the distinct agreement between them.”

It appears from the evidence that certain estimates were made both in May and July, as to what the actual first cost would be—taking material and labor as constituting the cost ; and it further appears that in forwarding certain of the manufactured goods from Orillia, the plaintiff adopted these estimates as shewing the actual first cost.

The plaintiff says, that as to the estimates, he took no part in making them, but that they were made to enable the company to see what would be the probable cost; and that as to the invoices, he adopted the company's estimates until he should be able to ascertain exactly what the goods did cost him.

The defendants' argument, as it seems to me, amounts to this, that, instead of the plaintiff having eleven or twelve per cent on the actual first cost, it was agreed that the company should supply him with the material at certain fixed prices; advance him the money to pay the wages, and then buy from him the goods so manufactured at prices also fixed, whether such prices gave the plaintiff eleven, twelve, or no per cent for his profit.

This is not the agreement entered into between the parties in writing, and is, I think, quite inconsistent with it.

The argument may, it seems to me, be further illustrated as follows:

A. desires B. to build for him a house, agreeing to supply all the material at certain fixed prices, and to furnish him the money to pay wages; and, for his services, to allow him eleven per cent on the "actual first cost." Before entering into the contract, A. desires to know what the house will cost him, and sits down with B. and makes an estimate charging up materials, labor, and the eleven per cent, making the total cost say \$5,000. Both A. and B. agree that in their opinion that will be the cost of the house; and, having made such an estimate, and both being of the opinion that the house will not cost more, they then draw up and sign an agreement, that A. will supply the materials at certain fixed prices; advance money for wages, and allow twelve per cent on the actual first cost.

It is necessary that the prices for the materials should be fixed, else A. might charge an unfairly small sum for them and so lower the percentage. It is apparent that the amount paid for materials may possibly exceed the estimate, although probably it should not; but it is cer-

tain that the amount paid for wages, will depend upon the skill, ability and diligence of the workmen, and thus fluctuate.

The house is completed, and it is found that the actual first cost has been \$5,500. Is B. to lose the \$500 or A.? Would not the written agreement govern and the estimate be deemed to be what the word implies? Could the estimate cut down the natural and ordinary meaning of the words?

This last illustration is more favorable to the defendant company than the facts of this case, for it was manifestly to the interest of the plaintiff to get all the work out of his men possible—as the more work that was turned out in a day, the greater his percentage. To illustrate—suppose a man employed at, say \$2 a day, could turn out or complete an article worth in materials, say \$6, in half a day, the commission on his day's work would be, say 11 per cent on twice $6 + 2 = \$14 = \1.54 , while if he idled and completed only one, the percentage would be only 11 per cent on \$8 = 88c.

On the ground of reasonableness, I see nothing to advance the defendants' contention. As to the price of materials, the plaintiff is protected by the price being fixed; and as to wages, the defendant-company, by the interest of the plaintiff in having work completed. The onus is on the plaintiff to shew the actual material used, and the wages paid. The price of the materials being fixed, the estimates will serve as evidence of some considerable potency to shew the actual amount of material which should have been used and the wages which should have been paid; but when once the actual first cost has been thus ascertained, I think the written agreement governs and the plaintiff is entitled to his percentage on the actual first cost.

Had the question been left open by the agreement, I am not satisfied that the evidence discloses any agreement by the plaintiff to fix the actual first cost; but I do not enquire further as to this, being of the opinion that the

parties have, by their agreement, precluded themselves from shewing any thing inconsistent with the natural meaning of the words "actual first cost;" and thus I agree to the conclusion arrived at by the learned Chief Justice.

Mr. Shepley argued that "actual first cost" meant no more than "cost." In one sense, that may be so; but the use of the three words as found in the agreement so emphasizes the meaning as to increase the difficulties in the the company's way of showing a meaning differing from the natural and ordinary one.

I think the motion fails, and must be dismissed with costs.

The following cases may be referred to as collecting the authorities: *Ellis v. Abell*, 10 A. R. 226; *McNeely v. McWilliams*, 13 A. R. 324.

MACMAHON, J.—During the argument of the case, I was strongly impressed with the view of the defendants' case as presented by Mr. Shepley, and I have no doubt the defendants' understanding of the arrangement was as contended for by their counsel. I think the schedules prepared by the plaintiff and the manager of the defendants, were intended by the defendants as a fixing of the prices of articles to be manufactured, to which prices was to be added the eleven per cent, the remuneration or profit to the plaintiff for his services, &c.

If the design of the defendants was that the schedules should fix the prices at which the plaintiff should manufacture the goods, their object has been defeated by the language employed in the agreement entered into between the plaintiffs and the company on the 1st July, 1886.

[COMMON PLEAS DIVISION.]

ANDREWS V. THE BANK OF TORONTO.

Bill of exchange—Payment in full by acceptor to holder—Part payment by drawer to holder—Right of acceptor to recover surplus—Deed of composition and discharge—Covenant not to sue.

B. & Co., discounted with defendants a draft drawn by the former on the plaintiff for the amount of his indebtedness which plaintiff accepted, but did not pay at maturity. Subsequently B. & Co., made an assignment for the benefit of their creditors; and afterwards plaintiff also becoming embarrassed, procured his creditors, including B. & Co.'s estate to execute a deed of composition and discharge whereby plaintiff's creditors agreed to accept 50 cts. on the dollar on their respective debts, payable thirty days from the date of the deed, one D. being surety for the said payment within the time limited. There was a covenant by plaintiff and his surety to pay the composition to the several creditors on or before a fixed date, and by the creditors with plaintiff not to sue for their several debts, and if plaintiff and his surety should observe and perform the covenants, &c. on their part, the creditors would release and deliver up the bills notes, &c., held by them; and if any of the creditors should sue for their debts the deed might be pleaded in bar. The defendants refused to execute the deed of composition. They proved for the amount of the draft with other indebtedness against B. & Co.'s estate and received a dividend of 50 cts. and threatened to sue plaintiff, and he, not knowing that they had received the dividend, paid them the amount of the draft which they applied on B. & Co.'s general indebtedness and were thus paid in full, but on discovering the facts he brought this action to recover the amount received by them. The plaintiff had not paid B. & Co. the 50 cts. or any part thereof.

Held, that the covenant not to sue in the deed of composition and discharge was not absolute, but merely conditional on payment being made within thirty days; and as plaintiff had not paid B. & Co. within the time limited he could not have claimed a release and set up the the covenant as a bar to the action, [Rose, J. doubting]: that the defendants were trustees for B. & Co. to the extent of 40 cts. in the dollar of the amount received from plaintiff, and that B. & Co.'s estate could compel the defendants to refund such amount to them, and therefore plaintiff had no right of action against the defendants.

Per ROSE, J.—Had the deed of composition and discharge been effective the defendants could not have recovered from plaintiff more than sufficient to satisfy their own claim in full either in their own right or as trustees for B. & Co.

THIS was an action tried by Armour, J., without a jury, at the St. Catharines Spring Assizes, 1887.

The learned Judge gave a considered judgment, in which he briefly set out the facts of the case.

ARMOUR, J.—The material facts in this case are not in dispute and never were and this case ought to have been disposed of and not sent for a new trial.

D. H. Bastedo & Co., on the 1st of September, 1883, drew their bill upon the plaintiff, payable in four months, for \$783.50, the amount of a debt which he owed them. This bill was accepted by the plaintiff, and was a few day after discounted by the defendants for D. H. Bastedo & Co. It matured on the 4th of January, 1884, was protested, and remained the property of the defendants until paid by the plaintiff as hereinafter stated. On the 7th day of January, 1884, D. H. Bastedo & Co., assigned for the benefit of creditors to one Blackley. On the 25th day of January, 1884, the plaintiff procured a deed of composition and discharge to be executed by his creditors by which he agreed to pay them fifty cents in the dollar on their claims; and in the schedule to this deed D. H. Bastedo & Co.'s estate appeared as creditors for the sum of \$783.01, an amount covered by the bill drawn as aforesaid. This deed was executed by D. H. Bastedo & Co., and by Blackley their trustee

The defendants claimed against the estate of D. H. Bastedo & Co. the amount of this bill and of other paper held by them, on which D. H. Bastedo & Co.'s name appeared, and received dividends upon this bill and upon such other paper to the amount of fifty cents on the dollar.

Afterwards they sued or threatened to sue the plaintiff for the amount of this bill; and he, not knowing that the defendants had received any dividends upon it from the estate of D. H. Bastedo & Co., paid the amount of it in full to the defendants.

Afterwards, having discovered that the defendants had received these dividends upon this bill, he brought this action to recover them.

The defendants after they had received payment of this bill, applied the dividends they had received upon it upon paper which they had discounted for D. H. Bastedo & Co., and upon which the name of a customer of the defendants appeared as an accommodation guarantor.

There is no doubt that upon payment of the bill the defendants held the dividends they had received upon this bill as trustees thereof for the estate of D. H. Bastedo & Co., and they had no right to apply them as they saw fit. They have, and have applied these dividends, which they have no right to have and apply; but I do not think the plaintiff is the person who is entitled to complain of this. He is only entitled to them if the effect of the deed of composition and discharge was to vest them in him or to entitle

him in equity to them. The interest of the estate of D. H. Bastedo & Co., in these dividends certainly did not pass to him by the terms of this deed; nor do I think it did by the equitable effect of it. The interest of the estate of D. H. Bastedo & Co. in these dividends did not arise until payment of this bill by the plaintiff; and I do not see how I could hold that the equitable effect of the deed of composition and discharge, executed long before these dividends were paid, assuming that the trustee of the estate of D. H. Bastedo & Co. had power to execute such a deed, was to vest the interest of the estate in these dividends in the plaintiff. I do not think that the creditors of the estate of D. H. Bastedo & Co. could be deprived of their interest in these dividends without their express assent; and it would be certainly inequitable to do so.

I think the plaintiff has failed to establish that he is the person entitled to these dividends; and that the action must be dismissed with costs.

In Easter Sittings, 1887, the plaintiff moved, on notice, to set aside the judgment entered for the defendants, and to enter judgment for him.

During Michaelmas Sittings 1887 the motion was argued, but in consequence of a disagreement of the Court a re-argument was directed.

In Hilary Sittings, February 15, 1888, the re-argument took place.

Lash, Q.C., supported the motion, and referred to *Bardwell v. Lydall*, 7 Bing. 489; *Raikes v. Todd*, 8 A. & E. 846; *Byles on Bills*, 14th ed., 304.

Robinson, Q.C., and *T. P. Galt*, contra, referred to *Daniel on Negotiable Instruments*, 3rd ed., sec. 1237; *Thornton v. Maynard*, L. R. 10 C. P. 695, 698; *Jones v. Broadhurst*, 9 C. B. 173; *Chalmers on Bills*, 2nd ed., 197, *et seq.*; *Gooderham v. Bank of Upper Canada*, 9 Gr. 39; *Winslow's Law of Private Arrangements*, 49, 53.

March 10, 1888. GALT, C. J.—The plaintiff was indebted to a firm of Bastedo & Co., and accepted a draft drawn by them on 17th September, 1883, for the sum of \$783.50, payable four months after date, which draft

was accepted by the plaintiff, payable to the defendants. Before the draft matured, namely, on 7th January, 1884, Bastedo & Co. made an assignment for the benefit of creditors. The defendants were creditors to a considerable amount, and proved against the estate. The amount for which they proved included the above draft. After the draft matured and was dishonored, the plaintiff made a composition deed, bearing date the 25th January, whereby the plaintiff agreed to pay a composition of fifty cents on the dollar to the respective creditors executing the said deed. He applied to the defendants to become parties to this deed, which they refused to do. The assignee of the Bastedo estate did execute the deed. The deed sets out that the plaintiff had agreed to pay the creditors executing the said deed within thirty days the sum of fifty cents on the dollar in full of their respective debts, and the creditors agreed to accept the said sum "of fifty cents upon the dollar in full satisfaction of all debts and sums of money which shall be due or owing by the said party of the first part to them, the said (fifty cents) to be paid before the 25th day of February next."

On his examination at the trial, the plaintiff in answer to the question: "Did you pay the Bastedo estate any dividend?" replied, "I did not have to; I didn't owe them any thing."

The Bastedo estate paid the defendants fifty cents on the dollar.

The defendants having threatened proceedings against the plaintiff, he paid the amount of his acceptance. He now brings this action claiming that as the Bastedo estate were parties to his deed of composition, he is entitled to claim the amount received by the defendants as a dividend on their claim against the estate in respect of this draft.

There is no doubt that the defendants have been overpaid the amount of this draft by the forty cents received from the Bastedo estate; but I concur with the learned Chief Justice that this plaintiff has no claim—he has paid nothing more than he owed. When the defendants threat-

ened the action against the plaintiff, if such action had been brought, the now defendants would have been entitled to recover from the now plaintiff the full amount of the draft.

The position of the parties is thus stated in *Byles on Bills*, 13th ed., p. 225. After stating that, "it was long an unsettled question whether payment in part or in full by the drawer to the holder will discharge the *acceptor pro tanto*," &c., "the better opinion however seems to be that to an action against the acceptor, payment by the drawer is no plea but only converts the holder into a trustee for the drawer when the holder afterwards recovers of the acceptor."

This is precisely the present case. The Bastedo estate were the drawers; the plaintiff was the acceptor; and the dividend of forty cents paid by the drawers is a sum which they have a right to claim, but with which the plaintiff has no concern unless, as between himself and the Bastedo estate, he can show that under the terms of the composition deed he is entitled to receive one half of the amount. The present defendants have nothing to do with that, they were no party to the deed.

ROSE, J.—This case first came on for trial before Chief Justice Wilson, and judgment was entered for the plaintiff for \$173.15.

This was moved against; and, it appearing that the judgment was based upon certain statements of facts which the learned Chief Justice believed to have been admitted, but which the defendants' counsel did not understand to have been admitted, the case was of necessity sent down for a new trial in order that the facts might be ascertained.

The present learned Chief Justice of the Queen's Bench Division, before whom the case came down for trial on the second occasion, was evidently not well advised of these facts when he concluded that the Court erred in sending the case down for a new trial.

It has been strongly urged before us that the learned Chief Justice erred in the result he arrived at entering judgment for the plaintiff.

It appears to me thus—assuming that the deed of composition entered into between Andrews and Bastedo & Co., was valid and binding—then Bastedo & Co., could not thereafter have recovered from Andrews more than fifty cents on the dollar of the claim. As to the remaining fifty cents, it became the duty of Bastedo & Co. to pay the bank and protect Andrews. When, therefore, Bastedo & Co's estate paid the bank forty cents on the dollar of the amount due on the note, such payment was a discharge *pro tanto* of such indebtedness, and the bank in suing Andrews had no right to recover more than the remaining sixty cents, either for itself, as only sixty cents were due to it, or as trustee for Bastedo & Co., for they were entitled to only fifty cents on the dollar.

Had Andrews, at the time he was sued by the bank of Toronto, known of this payment of forty cents on the dollar, I think he might have pleaded it in answer *pro tanto* to the claim, and judgment would have gone against him for only sixty cents, and as to the ten cents thereof, he would have been entitled to a claim upon the estate of Bastedo & Co.

I do not see that the assignment of Bastedo & Co., can make any difference in the right of the parties, assuming the power of the assignee to enter into the arrangement provided for by the deed.

If there had been no such assignment and Bastedo & Co. had agreed to accept fifty cents on the dollar so as to preclude them from collecting more, it would seem clear that the bank of Toronto, while not bound by such an arrangement so as to prevent it recovering the whole of its claim as against either Bastedo & Co., or Andrews, would be bound to this extent that it could not recover from Andrews more than sufficient to satisfy its own claim in full; and that it could not, claiming as trustee for Bastedo & Co., recover in excess of its own claim any

sum that Bastedo & Co. were unable to recover in their own name.

Had Bastedo & Co. paid the bank of Toronto its whole claim of 100 cents on the dollar and retired the note they could not, assuming the binding character of the deed, have recovered from Andrews & Co., more than fifty cents on the dollar; and so, it seems to me, having paid the bank forty cents on the dollar instead of 100, they cannot, through the bank, recover more than fifty cents on the dollar, although the bank might recover sixty.

If the present judgment stands, the result will be that instead of Bastedo & Co's estate receiving fifty cents on the dollar, as the agreed, they will recover 100 cents.

The following cases may be referred to: *Bailey v. Griffith*, 40 U. C. R. 418; *Bardwell v. Lydall*, 7 Bing. 489; *Raikes v. Todd*, 8 A. & E. 846.

The question remains, was the deed effective?

The learned Chief Justice of the Queen's Bench Division, raises the question in his judgment as to the right or power of the assignee of Bastedo & Co. to enter into the composition deed with the plaintiff.

After some consideration, I have come to the conclusion that he had such power. The debt was assigned to him. Whatever rights Bastedo & Co. had, were transferred to him for the purpose of realizing the same in order to pay creditors. For his manner of executing his trusts, he is responsible to the creditors, the *cestuis que trust*; and, if he has been neglectful and they have sustained loss, he must answer to them. It would seem an unwise rendering of the law to say that where it was made clear beyond doubt that nothing would be collected, the assignee would not have power to accept fifty cents on the dollar, or any other sum, and give a discharge.

The deed of Bastedo & Co. gives express power to give effectual receipts and discharges.

It may be that section 29 of R. S. O. ch. 107, may apply as giving express power to compound. It commences as follows: "It shall be lawful for any executors," not

naming trustees; but by sub-sec. 3, says, "this section shall apply and extend to both present and future trustees and executors."

I think *Wiles v. Gresham*, 5 DeG. M. & G. 770, and *Pennington v. Healey*, 1 C. & M. 402, are cases in point as shewing the power to compound, with the liability to be charged with loss in event of an unwise exercise of discretion.

Then as to the effect of the deed between the plaintiff and Bastedo & Co's assignee. It recites an agreement by the plaintiff to pay his creditors fifty cents on the dollar within thirty days; the agreement by the party of the second part to become surety for the punctual payment within the time, and that the creditors have consented and agreed to accept the same in full of their respective debts; and witnessed: "That in pursuance of the agreement, and in consideration of the covenants and agreements on the part of the said persons and firms, parties hereto of the third part hereinafter contained," the plaintiff and his surety covenanted with the creditors to pay the composition. Then, follows a proviso that, if, within the thirty days, the deed is not executed by all the creditors, appearing in the schedule, the deed, and "every covenant, clause, and agreement herein contained, shall cease and determine and be utterly void." Then a covenant by the creditors to accept the composition in full satisfaction; "the same to be paid before the 25th February next." Then a covenant not to sue the plaintiff, followed by a covenant, that if the plaintiff and his surety "do and shall observe and keep and perform the several covenants and agreements hereinbefore on their parts respectively contained," that is, I suppose, pay the fifty cents on the dollar; then the creditors will execute a release, and deliver up the bond, bills, notes, &c.; and, finally, an agreement, that if "the said creditors, or any of them, shall sue, prosecute, impede, incumber or take legal proceedings of any nature against the said party of the first part in respect of the said several debts, contrary to the true intent and meaning of these presents, then this

indenture and the several covenants of the said creditors herein contained, may be pleaded in bar to the said respective debts, or any prosecution, suit or action that may be brought in respect thereof."

The covenant not to sue is absolute and unconditional; and the last provision above quoted would have enabled the plaintiff to plead the deed and covenant in bar to any action brought by Bastedo & Co's assignee on the original claim, if an action had been brought contrary to the true intent and meaning of the deed.

Then did the creditors release the plaintiff from his indebtedness on the original cause of action, accepting the composition in lieu thereof; or was the release conditional on the payment of the composition within thirty days?

I, for some time, inclined very strongly to the first view; but as the other members of the Court take a different view, I do not, upon further consideration, feel justified in dissenting, although the peculiar form of the deed does not leave the matter as free from doubt as I could wish.

Apart from the covenant not to sue, the fair reading of the deed must, I think, be that it operates as a release only upon the condition of the composition being paid within thirty days.

The covenant not to sue is, however, absolute in form, and in such form would operate as a release: 2 *Wms. Saunders*, (ed. 1871), 140; *Ford v. Beech*, 11 Q. B. 852; *Cumber v. Wane*, 1 Sm. L. C., 8th ed., p. 369, *et seq.* *Addison on Contracts*, 8th ed., p. 1224.

If the covenant not to sue is to be construed as a release, then the declaration allowing it to be pleaded in bar if suit is had "contrary to the true intent and meaning of these presents," would seem to be unnecessary, for without it the covenant might be pleaded as a release; but if the covenant not to sue be construed as not to sue during the thirty days, then the declaratory clause, according to the cases, would enable the debtor to plead it in bar to any action brought within thirty days; "contrary to the true intent and meaning of these presents:" *Gibbons v. Vouil-*

lon, 8 C. B. 483; *Walker v. Nevill*, 3 H. & C. 403; *Corner v. Sweet*, L. R. 1 C. P. 456.

And perhaps this is the proper view to take, although the effect is to cut down the absolute words of the covenant so as to make it conditional in its effect.

On the whole, I concur in the result arrived at, that the motion fails, and must be dismissed, with costs.

MACMAHON, J.—[After stating the facts.] The simple question for determination is this: The plaintiff, as acceptor, being primarily liable to the bank as holders of a bill accepted for value, and the drawers having paid to the bank a part of the amount due on the bill, were the bank, as holders, precluded from recovering from the acceptor the full amount; and if they were not, on whose account do they hold the 40c. on the dollar received from Bastedo & Co.?

In *Jones v. Broadhurst*, 9 C.B. 173, an action was brought on a bill of sale for £49 by the endorsee against the acceptor, the latter pleaded that after the endorsement, and before commencement of the action, the drawer delivered to the plaintiffs, and the plaintiffs accepted, goods to the value of £50 in satisfaction and discharge of the bill, and of all damages and costs in respect thereof; and that the plaintiffs from the time of said satisfaction of the bill had always held the same against the will and consent of the drawer, and so still held the same; and that the plaintiffs had commenced the action, and prosecuted the same, against and in opposition to the will and consent of the drawer. After verdict for the defendant, it was held that the plea was no bar to the plaintiffs' right to recover against the defendant on the bill.

Cresswell, J., in delivering the judgment of the Court says, at p. 181: "In considering the case upon principle, it will be proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers

and acceptor are parties to the same instrument, as contractors with each other, and not as joint contractors with a third person; and that, by the endorsement of the bill, independent and different contracts arise on the respective parts of the drawers and acceptor, with the endorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of the acceptors or drawees making default, and of the holder's performing certain conditions precedent, such as, presenting the bill according to its tenor, and giving due notice of the failure of the acceptor, or drawee, to pay upon a proper presentment. The contracts created by the bill, as regards the drawers and acceptor, are therefore essentially distinct; and there seems to be no legal ground why the endorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor."

And, at p. 185, Cresswell, J., intimated that the indorsee on recovering from the acceptor, was trustee for the drawer to the amount, whatever it might be, of the drawer's payment. And it is stated by Coleridge, C. J., in *Thornton v. Maynard*, L. R. 10 C. P. 695, at p. 698, that "Sir John Byles adopts this view: 'To an action,' says he, 'against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer when the holder afterwards recovers from the acceptor;'" *Byles on Bills*, 10th ed., 110. "And this is equally true, as the context of Sir John Byles' book shews, whether the payment by the drawer was of part of the bill or of the whole."

This is the view of the law which Coleridge, C. J., adopts in his judgment in *Thornton v. Maynard*.

If the bank are the trustees of Bastedo & Co.'s estate for the amount received from them as drawers, they cannot be the trustees of the plaintiff as acceptors for the same amount.

Under the authorities Bastedo & Co's estate could compel the bank to refund the amount received by them, of which the bank are now the trustees. If so, the plaintiff can have no right of action against the bank.

It was urged that the execution by Bastedo & Co. of the deed of composition agreeing to accept 50c. on the dollar on his claim, placed the plaintiff in a position as regards the bank enabling him to maintain this action.

In *Thornton v. Maynard*, L. R. 10 C. P. 695, an action brought by the holder against the acceptor of several bills of exchange, the defendant pleaded by way of equitable defence that the drawers became bankrupt, and that the plaintiff received £425 as a dividend from their estate on account of the bills, and as to that sum was suing only as trustee for the drawers; and the plea claimed to set off a debt due to the defendant from the drawers. This was held a good equitable defence.

Had the bank brought an action against the plaintiff after being paid by Bastedo & Co. the 40c. on the dollar on account of this bill, could the plaintiff have pleaded such payment, and set up, as to the 40c. on the dollar, the bank were suing as trustees for Bastedo & Co., and that by reason of Bastedo & Co. having executed the deed of composition agreeing to accept 50c. on the dollar, he was enabled to set up Bastedo & Co.'s covenant to accept the 50c. as a defence to the bank recovering from him more than 60c. on the dollar on the bill?

In effect the plaintiff's contention is that he could have successfully pleaded such a defence as indicated had an action been brought by the defendants under the circumstances stated. It is, however, unnecessary, in the view I take of the effect of the composition deed to decide the point; and I therefore refrain from expressing any opinion regarding it.

I do not see that the execution by Bastedo & Co. of the composition deed helps the plaintiff in the slightest. He did not carry out his covenant to pay within the thirty days from the execution of the deed; and the covenant

by the creditors was to release only on payment by the plaintiff and his surety of the fifty cents on the dollar in the time within limited by the deed. If not paid within the time, Bastedo & Co. could not be compelled to grant a release; and, if they could not be compelled under their covenant to grant a release, then they were remitted to their original rights.

If I am correct in my view as to the plaintiff's right to a release being limited by his strict fulfilment of the covenant to pay within the thirty days, then the covenant by the creditors not to sue, is a limited covenant not to sue until the time had elapsed within which the plaintiff and his surety had agreed to pay the composition.

The law is thus laid down by Mellish, L. J., in *Re Hatton*, L. R. 7 Ch. 726: "At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place, the creditors will accept the composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition."

"In every case it is a question of construction on the instrument what was the agreement between the parties; but the intention of the parties that the agreement itself was to be accepted in satisfaction will have to be clearly expressed to displace the presumption that on default the original debt was to revive; for as a general rule, the non-payment of the composition is the failure of a condition going to the whole root of the arrangement, and the original debt remains and may be resorted to notwithstanding the agreement:" *Winslow*, p. 54, citing *Evans v. Powis*, 1 Ex. 601; *Edwards v. Hancher*, 1 C. P. D. 111, 118; *Edwards v. Coombe*, L. R. 7 C. P. 519, 523.

The cases of *Bardwell v. Lydall*, 7 Bing. 489; *Bailey v. Griffith*, 40 U. C. R. 418; *Thornton v. McKewan*, 1 H. & M. 525, were cited on behalf of the plaintiff, but I have been unable to see where they have any application to the present case, being merely authorities deciding the extent of the liability of a surety which the plaintiff is not.

In my opinion the motion must be dismissed, and the judgment of the learned Chief Justice affirmed, with costs.

[QUEEN'S BENCH DIVISION.]

THOMPSON V. ROBINSON AND WILSON.

*Solicitor and client—Breach of duty by solicitor—Liability of partner—
Scrivener's business.*

The defendants, who in 1878 entered into partnership as solicitors, carried on as part of their ordinary business that of investing moneys for clients. Previous to the partnership the defendant R. had been employed by the plaintiff to do that kind of business for her, and during the period of the partnership the whole of the money originally entrusted to R. was lost, through a breach of duty on the part of R. in investing it. From the commencement of the partnership down to March, 1883, after which time the breach of duty occurred, the account of the plaintiff was kept in the books of the firm, charges for services rendered were made against her, though not for the management of her affairs or for services in making investments, and conveyancing charges were also made against borrowers from her funds, and the profits went to the account of the partnership. The evidence shewed that the plaintiff insisted upon dealing with R. as her special adviser and solicitor; that she disliked W. and never consulted him as to her affairs; and that she wished her affairs to be kept as far as possible from the knowledge of anyone but R.

It also appeared from the evidence that R. was to share in the profits arising from the investment which resulted in the loss of the plaintiff's money, and that he did not make any charge for services in connection with it. Another fact shewn was that R. during part of the period of partnership kept the plaintiff's account in a book which he called his private ledger.

Held, (reversing the judgment of BOYD, C.,) that in making the investment R. was acting as solicitor for the plaintiff, and that he and his partner W. were both liable for the breach of his duty: and that none of the circumstances mentioned above operated to absolve them from liability as solicitors.

Seemle, that in this Province the business which is called "scrivener's business" is a part of the ordinary business of a solicitor.

THIS was an appeal by the plaintiff from so much of the judgment of BOYD, C., at the trial as decided that the defendants were not liable to the plaintiff for money invested in Dakota lands; and a cross-appeal by the defendant Wilson from the judgment so far as it decided that he was liable to the plaintiff in any respect.

The facts are fully set out in the judgment.

December 16, 1887, the appeal was argued by *Osler*, Q. C., and *Douglas*, Q. C., for the plaintiff; *W. Cassels*, Q. C., for the defendant Robinson; and *Moss*, Q. C., for the defendant Wilson.

May 28, 1888. STREET, J.—In the month of August, 1877, the defendant Robinson, who was then a solicitor practising in Chatham without partners, was employed by the plaintiff to manage her business affairs. Her property consisted almost entirely of the estate of her husband, who had lately died intestate leaving one child, who is still an infant; the plaintiff had been appointed administrator of her husband's estate—which consisted of some \$9,000 after payment of debts and expenses. The defendant Robinson proceeded to invest the plaintiff's money upon mortgages, and seems from the first to have had her fullest confidence. In the year 1878 he took the other defendant, Matthew Wilson, into partnership with him, and the partnership was continued until a short time before this action was commenced. During the period of the partnership the whole of the moneys entrusted originally to Robinson have been lost, and the object of this action is to make both defendants liable to replace them or to answer for their alleged negligence in losing them. The evidence, I think, and the defendants' ledgers and mortgage books show that during the period of their partnership the defendants carried on, as part of their ordinary business, that of receiving money for clients for the purpose of investing it generally, of collecting the principal and interest upon the securities of their clients so taken, and of re-investing it again as opportunity offered—in fact of managing their clients' business of this kind.

From the commencement of their partnership down to March, 1883, the account of the plaintiff was kept in the books of the firm—principal moneys and interest were collected and reinvested for her, and charges for services rendered in connection with her business were made against her. and, although no charge is made against her for management of her affairs, or for services in making investments, the charges which were made against borrowers for conveyancing, and the costs of enforcing her securities when necessary, went into the profits of the partnership.

About January, 1883, the defendant Robinson represented to her that the purchase of Dakota lands would be a profitable investment for her to make, and she gave her assent to his making such an investment on her account, either before or after some of her means had been applied in this way. The conclusion I draw from the evidence is, that an investment of \$1,500 was all that she understood was being made in these lands when she was spoken to, and that Robinson, being satisfied that the investment, or more properly the speculation, into which he had launched her would be a profitable one, increased the amount of it without deeming it necessary to obtain any further authority from her, or to consult her further about the matter. The moneys used in the original purchases, which were made not later than 8th March, 1883, were drawn for the purpose from moneys in the bank at the credit of the defendants' firm belonging to the plaintiff, a portion of them being the proceeds of the sale of a mortgage belonging to her, and the charges for drawing and registering the assignment being entered against the plaintiff in the books of the firm. The money so realized was paid over by the firm to Robinson or to other persons by his direction upon cheques drawn by him, and was all applied in payments upon the purchase of these Dakota lands.

Instead of purchasing unincumbered lands, Robinson purchased the rights of persons who had themselves agreed to purchase from a railway company, and had only partially paid for them; he only acquired equitable interests, which were subject to the payment of considerable sums of money. The moneys he paid to the original purchasers represented moneys they had paid, and probably some supposed increase in value. Failing to find purchasers before the instalments came due, Robinson was obliged to make further payments upon the lands out of the plaintiff's moneys in order to endeavour to save what had been originally invested, and the final result appears to have been that after paying upwards of \$6,000 out of the plaintiff's means upon these instalments, Robinson, in whose name the

title had been taken, conveyed the lands to one Barfoot as security for an advance of \$3,000, which was applied in further payments upon the lands in question, the plaintiff's own available means having been exhausted. The moneys of the plaintiff appear to be totally lost.

The purchase of interests such as those which were purchased, unless made with the express authority of the client, was a plain breach of duty on the part of Robinson as a solicitor, and he was bound in order to clear himself of the consequences of such a breach to produce satisfactory evidence that he had such authority; no such evidence is forthcoming, and I think, on the contrary, that it is plain that no such authority was given. The case, so far as these Dakota lands are concerned, appears then to narrow itself down to the question as to whether the defendant Wilson is liable for a loss which a client of the firm has sustained through a breach of duty of Robinson in making an investment of moneys of the client. Under ordinary circumstances, there could be but one answer to such a question. See *Green v. Dixon*, 1 Jur. 137; *Langdon v. Godfrey*, 4 F. & F. 445. But in the present case it is contended on the part of Wilson that special circumstances exist which exonerate him from liability. He says that he was by the deliberate action of the plaintiff herself excluded from all knowledge of or control over her affairs, and that Robinson alone was her solicitor, and the firm were not her solicitors. Had such a state of things been proved, I think it would have been impossible to treat Wilson as responsible for dealings from which the client had deliberately excluded him, and that the total absence of authority to interfere would have carried with it a corresponding absence of liability. But the fact being well established, that down to the very time when the purchases of these lands were made in March, 1883, both defendants were dealing as a firm with her affairs, the onus is thrown upon Wilson of shewing beyond question that his liability for the subsequent acts of his partner has been terminated with the assent of the client. The evidence upon this point does not go to the necessary

extent; it certainly goes to the extent of shewing that the plaintiff had unbounded confidence in Robinson, and insisted upon dealing with him as her special adviser and solicitor; that she disliked Wilson, and never consulted him as to her affairs; that she desired her affairs to be kept as far as possible from the knowledge of any one but Robinson himself, lest they should be talked about; but she must be taken to have known that down to a certain period both members of the firm were liable to her, and she was justified in continuing to believe that that liability was not terminated as to either, so long as they remained in partnership, unless Wilson, as he might have done, had given her to understand that his liability was at an end.

The case in this respect resembles the cases of *Eager v. Barnes*, 31 Beav. 579; *St. Aubyn v. Smart*, L. R. 3 Ch. 646; and *Dundonald v. Masterman*, L. R. 7 Eq. 504, where the client seems to have treated one member of a firm of solicitors as his special adviser and correspondent, but not to the extent necessary to relieve the other members of the firm from liability. In *Coomer v. Bromley*, 5 DeG. & Sm. 532, the duty of the firm was only to invest the moneys in question in the name of one member of the firm, and this duty having been performed and no other duty devolving upon them as a firm in connection with the subsequent collection or dealing with the money, it was held that they were not liable as a firm for the misappropriation of the money by the member of the firm in whose sole name and under whose sole control the money had been properly invested.

In *Harman v. Johnson*, 2 E. & B. 61, the Court were of opinion that the members of a firm of solicitors were clearly liable for the proper disposition of a sum of money handed to one of the partners for the purpose of being invested upon a particular security.

In *Cleather v. Twisden*, 28 Ch. D. 340, the business transacted was held by the Court not to fall within the scope of the business of the firm of the solicitors who were sought to be made liable for the acts of one member of the

firm. In the present case the firm were employed generally to manage the plaintiff's affairs, and were bound to exercise proper care in doing so.

The defendant Wilson further contended that he was not liable because the transaction as to these Dakota lands was a private speculation into which the plaintiff and Robinson had entered, and with which the firm, as a firm, had no connection. It is true that the arrangement seems to have been that Robinson was to share in the profits arising from it, and that he does not appear to have made any charge to the plaintiff for services in connection with it; but I cannot see that his having stipulated for a share of the profits of a venture into which, as solicitor for the plaintiff, he induced her to embark as a proper investment of the funds in his hands, and in which he certainly appears to have acted for her throughout, can absolve him from a liability which would have attached to his acts in the absence of such a stipulation. The question, is whether or not he was acting in the matter as her solicitor; if he was, and as to that I can see no room for doubt, then he and his partner must be held liable for any breach of his duty as a solicitor.

The defendant Wilson endeavoured to show that the firm had not, as a firm, carried on the business which in England is distinguished as scrivener's business, and that that branch of the business was carried on exclusively by Robinson. If it were necessary to decide this question, which it appears to me it is not, I should be inclined to hold that in this Province the business which is called scrivener's business is a part of the ordinary business of a solicitor. The evidence here, however, seems to me to shew that the defendants' firm did clearly carry on, as a part of its ordinary business, that which in England would be called scrivener's work. The plaintiff's own account in their ledger and the evidence of Mr. Bell show this plainly, I think. The profits arising from the investments made, so far as they were charges paid by borrowers, went into the profits of the firm. It was only the charges made

against the clients to which Robinson seems to have been entitled under his arrangement with his partner, and the mere fact, if fact it was, that he was entitled in case a question had arisen, to the control, as between himself and his partner, of the moneys of the estates which were in their hands, although such moneys were collected by the firm, and the transactions relating to them appear in the books of the firm, is not sufficient to negative all the other facts, which shew an actual partnership dealing in business of the kind called scrivener's business. I do not feel pressed by the fact of the defendant Robinson having, during a portion of the time during which the firm was in existence, kept the plaintiff's accounts in a book which he called his private ledger. Down to March, 1881, entries from the firm account books relating to the plaintiff's accounts seem to have been transcribed into this book. During the two years next after that date there are no entries in this private ledger relating to the plaintiff's affairs, and her accounts were kept entirely in the books of the firm. Thenceforward, that is to say, from March, 1883, when the first moneys were invested in the Dakota lands, the plaintiff's account disappears from the firm ledger and is kept in this private ledger; but the plaintiff may well have supposed that this ledger was one of the books of the firm, especially as her remaining securities still appear to have remained recorded in their mortgage books.

I am of opinion, upon the whole, that the defendants are jointly and severally liable for any loss which has happened to the plaintiff owing to any negligence with which either is, or both are, chargeable in connection with any investments made by either partner or both partners of the plaintiff's money, including the purchase of these Dakota lands and the mortgage investments referred to in the evidence.

The plaintiff applied for leave to add as a party plaintiff the infant, her son, who is entitled to a share of the moneys which have been lost, and which were in her hands

as administratrix, to the knowledge of the defendants; but the amendments to the pleadings which would be necessary in order to give to the infant any greater rights than those to which I think the plaintiff is entitled, would involve allegations of breaches of trust to which she herself was a party. For this reason it seems desirable that, if the infant has any rights, they should be enforced in an action to which the present plaintiff is not a party.

There should be a reference to the local Master at Chatham, to take an account of the moneys of the plaintiff which came to the hands of the defendants or either of them, and of their disposition thereof, and of the amounts applied by the defendants or either of them in the purchase of the Dakota lands, and of the interest thereon, and any other outlays for taxes or otherwise made out of the moneys of the plaintiff, with interest thereon: also, an account of any incumbrances existing, and of the present cash value of such lands; also an account of the amounts advanced by the defendants or either of them upon mortgages or other securities for or on behalf of the plaintiff, of the re-payments on account thereof, and the present cash value of the securities held for the same.

Costs and further directions reserved until after the report.

ARMOUR, C. J., concurred.

FALCONBRIDGE, J., having been engaged in the case when at the bar, was not present at the argument, and took no part in the judgment.

Appeal allowed, and cross-appeal dismissed.

[CHANCERY DIVISION.]

HEFFERMAN V. TAYLOR ET AL.

Will—Life tenant—Power to lease—Trustees.

A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death, to sell and divide the proceeds among his children equally.

Held, that the wife had the right to leave the farm and deal herself directly with the tenant during her life.

In this case, those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the Court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant.

Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee.

THIS was an action brought by Mary Hefferman for possession of certain lands and other relief under the circumstances set out in the pleadings as follows:

The plaintiff was the widow of John Hefferman, who by his will dated October 17th, 1881, gave devised and bequeathed all his real and personal estate to the defendants William Taylor and John Macdonald (whom he also appointed his executors) as trustees, subject to the following trusts: "To allow and to give the use thereof to my wife, Mary Hefferman during her natural life for her support and maintenance and this provision is made as respects her free of all dower that she can claim in any of my estate. At her decease to make sale of said estate and divide the net proceeds thereof after paying off any existing encumbrance thereon between my children in equal parts
* * I give power to my executors and trustees to anticipate the time of selling or disposing of my said real and personal estate prior to the decease of my said wife, with her consent, provided that in doing so they are to safely secure to her during her life an equivalent for her support and maintenance which I have above provided to be paid her from my said estate."

The testator died on February 14th, 1882, seized of the lands in question, and the plaintiff elected to take the provision in the will in lieu of dower. She now desired to get possession of the lands, but the trustees refused to give her possession, and had, as she alleged, against her wishes, but as they alleged with her consent, leased the lands to one Brown, the co-defendant in the action for a term of years, who had entered into possession; and the trustees further insisted on receiving the rents and profits of the lands and would not allow the plaintiff to collect them, and, as the plaintiff alleged, intended to charge a commission on them. The plaintiff claimed possession, and that the lease to Brown might be cancelled, and for her costs of action.

The action came on for trial before Boyd, C., at Guelph, on April 11th, 1888.

W. Cassels, Q. C., and Peterson for the defendants. The plaintiff does not want to occupy personally but contends that the management of the farm should be taken away from the trustees. We refer to *Whiteside v. Miller*, 14 Gr. 393; *Orford v. Orford*, 6 O. R. 6; *Lewin on Trusts*, 7th ed. p. 576-7; *Tidd v. Lister*, 5 Madd. 429.

G. W. Field, for the plaintiff. The law holds that when rents and profits are payable to a *cestui que trust*, he is entitled to possession. Here the case is stronger and the plaintiff is entitled to the use of the lands without any intermediary. There is nothing in the will sufficient to give the executors the management of the property. The circumstance that the remainder is given to the children of the tenant for life is a strong circumstance in favour of giving possession to the plaintiff. On the whole will it was the evident intention of the testator to let plaintiff into possession for her life; *Jarman on Wills*, 4th ed., Vol. 2, pp. 293-307, and cases there cited.

April 25th, 1888. BOYD, C.--The contest arises as to a farm owned by the testator, and I think the construction contended for by the plaintiff is correct. The testator gives

all his estate, real and personal, to trustees, upon trust to allow and to give the use thereof to his wife during life for her support. That gives her an equitable estate for life, although the legal estate may be in the trustees. She claims the right to rent this farm and deal herself directly with the tenant during her life. The matter is compressed into a narrow compass by the Master of the Rolls in *Rab- beth v. Squire*, 19 Beav. 79. He says: "The construction is the same whether the legal estate is in the trustees or not. * * * If a testator gives his widow a house in London for life, must she occupy it—may she not rent it?" In that case the testator directed that his two sons might have the use and occupation of certain lands, they paying a certain rent. It was held that personal use and occupa- tion was not enjoined and that they might under-let the pro- perty. This result was affirmed on appeal, 4 DeG. & J. 406. So in *Mannox v. Greener*, 14 Eq. 456, it was decided that the free occupancy of a house which the testator left to his wife, entitled her either to reside therein or to let it during her life, as she might think fit.

Tidd v. Lister, 5 Madd. 429; *Whiteside v. Miller*, 14 Gr. 396; *Orford v. Orford*, 6 O. R. 6, cited for the defen- dants had all of them special provisions in the wills being dealt with in those cases, manifesting the wish of the testa- tor that the management and control of the property was to be with the trustees. It was said that it would be doing violence to the intentions of the testator if as between trustees and widow, the latter should be declared entitled to the possession, 14 Gr. 401. But no such context is to be found in this will—those entitled in remainder are the adult children of the life tenant and no active duties are cast upon the trustees during the continuance of the life estate. Such being the case the Court will give effect to the usual incidents of an estate for life by which the ten- ant can occupy or let or otherwise dispose of it as seems best to that tenant.

The evidence here is, that the plaintiff did not sanction the conduct of the trustees in leasing to their co-defendant

at the rent now payable by him. There is no evidence of *mala fides* on their part, but it may be that the widow can obtain a larger rent or some other benefit out of the property greater than that under the lease held by the trustees. The lease must be set aside and possession of the property given to the plaintiff or her nominee. This should be without costs to or against any of the parties and it is not a case for costs out of the estate to the executors.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE CITY OF ST. THOMAS v. THE
CREDIT VALLEY RAILWAY COMPANY.

Damages—Railways—Contract—Failure to run trains to points contracted for—Remoteness of damages—Loss to city on assessment—Measure of damages.

Where a railway company in breach of a contract entered into by them to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains

Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the enquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued.

Constat, that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighborhood could not be reckoned as constituents *per se* of the damages suffered by the corporation.

He'd, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment.

THIS was an appeal by the Credit Valley Railway Company from the report of the Master of this Court in

London, dated March 6th, 1886, pursuant to the judgment of Ferguson, J., of March 24th, 1884.

The action was brought for specific performance of an agreement entered into between the railway company and the city of St. Thomas, whereby the former agreed for the consideration of \$50,000 in debentures of the city to "run their railway from the town of Ingersoll to the Canada Southern Railway, at some point not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and that all the passenger trains of the Credit Valley Railway Company should run to and from a small station on Church street, for the purpose of checking baggage and the accommodation of passengers."

In pursuance of this agreement the debentures were duly delivered to the railway company, and the company did run their railway from Ingersoll to St. Thomas, and for a brief period they ran their passenger trains to and from a small station on Church street, not laying a track of their own, but by a subsequent arrangement to which the city was not a party utilizing that of the Canada Southern Railway. Later they wholly discontinued to run trains to and from the small station on Church street, thereby committing the breach complained of.

The action was tried by Ferguson, J., (7 O. R. 332) who refused to enforce the plaintiff's claim for specific performance, but held that the railway company had committed a breach of the agreement, and directed a reference to the Master at London as to the damages sustained by reason thereof.

The Master made his report on March 6th, 1886, and found that the plaintiffs had sustained damages by reason of the breach of agreement by the defendants to the amount of \$12,000, and the solicitors for both parties assenting thereto, he found such damages to the date of his report.

He gave his reasons for arriving at this result as follows :

1. The plaintiffs have sustained specific damages by the breach of the defendants' agreement.

2. The defendants are therefore answerable for such damages.

3. It is impossible to measure the damages so sustained, even approximately, unless by reference to the total amount of depreciation in assessment of the city of St. Thomas arising from the various causes appearing in evidence, to which causes the conclusion is to my mind irresistible that the wrong caused by the act of the defendants has very considerably contributed in the period covered by the evidence.

4. It is clear, however, that the wrong declared has not been, even in that period, the only or the main cause of this depreciation, but there being direct evidence of gradual decline in assessment from the several causes referred to, to the extent of upwards of \$40,000, the defendants must be held responsible for some part of that loss to the plaintiffs.

Duke of
Leeds v. The
Earl of Am-
herst, 20
Beav. 239.

Corporation
of Brussels v.
Ronald, 11
A. R. 605.

Missouri and
Kansas R. W.
Co. v. Fort
Scott, 15
Kansas 435

Howell v.
Young, 5 B
& C. 269.

Fitzsimmons
v. Chapman,
37 Mich. 139.

It is true that this loss has to a great extent been equalized in that time by private enterprise in the erection of buildings and improvements in the western part of the city, but this would have been so much gain to the city by increased values of assessable property had not the steady depreciation to which the act of the defendants was contributing been at the same time going on.

It is, I think, a fair inference to be drawn from these facts that, notwithstanding the outlay in improvements by individual owners of property to some extent equalizes the loss to the city by declining assessments, the city is still suffering loss in income to which, but for the depreciation referred to, it would have been entitled to. Hence there was a specific loss to the city from this depreciation, to which the act of the defendants undoubtedly to some extent contributed.

5. This being the case, it might appear that the true measure of damages would be simply the sum of \$20,000, the extra sum voted on the condition the breach of which forms the wrong here declared, because the majority for the full bonus of \$50,000 having been 55 votes, and no fewer than 32 of the witnesses having voted for that bonus on that condition only, it is fairly inferable that these 32 votes carried the by-law, and that the defendants having failed to carry out that condition, it might be said that the natural consequences would be that they should refund to the plaintiffs this sum of \$20,000.

6. I do not find, however, as I have already indicated, that this ought to be the basis on which the question of damages should rest. The true basis, I think, is the loss upon the assessed values. I cannot conclude that the plaintiffs have sustained damage to the full extent of the surplus of \$20,000.

The defendants to some extent carried out their undertaking, and have also in some degree made good to the city towards the east end the depre-

ciation to which their wrongful act contributed in the western section ; although in this connection I do not find that their contention is by any means wholly sustained.

7. Having, therefore, made a careful analysis of the whole evidence, and on perusal of several of the cases cited, to most of which I have had access, and adopting the principle that the wrongdoer or author of the mischief must be held responsible for the consequences of the wrong complained of to the party aggrieved, in damages, or a penal sum in compensation for the consequences following the wrong, I follow up that conclusion by finding that to the act of the defendants, as shewn by the weight of the evidence adduced under this reference, must be charged a considerable part of the losses sustained by the plaintiffs in the past three and a half years, and I have fixed the proportion, \$40,600, (see evidence of J. P. Martyn and H. Comfort), at a sum somewhat less than one-third of the whole loss in that period as a fair and I think not excessive compensation for the defendants' proportion of the depreciation caused by their act, and I find that sum to be \$12,000.

8. I have entirely rejected the contention of the plaintiffs as to other ways in which they could claim compensation in damages. They are too indefinite and vague, and it would be impossible to base even an approximate sum for damages upon the grounds suggested by counsel for the plaintiffs; and as to whether the defendants might even be called upon to construct an independent line into the city at a cost of \$75,000, to carry out the condition of which the breach is complained of, that, I think, is not now a question for me. It is disposed of by the judgment in appeal in this action. And with reference to the contention of the defendants that from the danger accompanying the passage of trains through the city their failure in the condition is a benefit rather than a loss, I have not given it much consideration because statutory enactments exist which can be enforced to prevent or at least to minimize the danger suggested

8. The evidence as to damages as a result of the wrong has, I think, been properly directed to the time between the date of the wrong complained of and the present, because such damage followed upon and was the necessary results of the wrong. I think I am warranted in so finding from the evidence, and in giving damages to the present time.

Mayne's
Treatise on
Damages, 4th
ed., p. 387-8.
414.

Howell v.
Young, 5 B.
& C. 269.

Any further claim made by the plaintiffs for damages must be, it appears to me, the ground for a new action.

McCargar v.
McKinnon,
17 Gr. 525;
Rosebatch v.
Parry, 27 Gr.
at p. 199.

The Statute of Limitations will in about two and a-half years bar further action, as it will run from date of wrong, (August, 1882).

The grounds of objection as set out in the notice of motion for this appeal were (1) that the Master improperly admitted evidence of damages to particular individuals only residents in the plaintiffs' corporation, but not of

damages to the plaintiffs as a corporation; (2) that the evidence upon which the Master found the depreciation in the assessed value of the plaintiffs' property in the west end to be \$40,600 is contradicted by other evidence, and is contrary to the weight of evidence. That it is of too vague and general a character to support the said finding, and that the proportion of one-third or thereabouts of \$40,600 in the said findings mentioned is only conjectural and not arrived at in any intelligible or legal manner; (3) that the evidence did not shew that the breach of the agreement complained of had depreciated the plaintiffs' property as a whole; (4) the findings of said Master in so far as they award the said damages are contrary to law and evidence, and the weight of evidence; (5) that the evidence shewed that the depreciation complained of was altogether due to causes existing long before the defendants' railway was extended to St. Thomas, said causes being ones over which the defendants had no control, and for which they were not in any way responsible; (6) that the evidence shewed that the plaintiffs had enjoyed the full benefit of the services of the defendants' railway, and that the present accommodation is more advantageous to the plaintiffs than the original arrangement, and combines with such advantages a higher degree of safety than formerly; (7) that the damages awarded are excessive and should in any event be materially lessened; (8) that in the evidence the plaintiffs had not shewn that they had sustained any damages by reason of the breach complained of for which they were entitled to recover; that the report shall be amended accordingly.

The appeal came on for argument on March 1st 1888, before Boyd, C.

C. Robinson, Q. C. and R. M. Wells, for the Credit Valley Railway. The corporation, not individuals, are suing. We contend that the corporation can recover no damages except what they have suffered on assessment. Still, even as to that, one has to remember that though the revenue of a

city is derived from assessment, they return some corresponding benefits, or are supposed to, sidewalks, sewers, roads, &c. We have not found authority that there is any other damage a city corporation can recover. [BOYD, C. — But the city never would have voted this bonus, except by the majority of the votes of the citizens. This majority are disappointed. Doesn't the city represent this majority? Is there not an inquiry common to the community apart from injury to individuals?] But here there is no common ground of complaint. The east end doesn't care about the railway running there. The evidence shews this. It seems impossible to reconcile the evidence with the amount of damages allowed here. Damages must be such as naturally and properly follow from the breach of contract. What evidence is there that if we ran to that small station the city would be one dollar richer? We are not without American authority, *Missouri and Kansas R. W. Co. v. City of Fort Scott*, 15 Kan. 435; *Fitzsimmons v. Chapman*, 37 Mich. 139. When you make a contract the damages for breach of which it would be impossible to reasonably appreciate, the proper course is to name some sum as liquidated damages; if the plaintiff sues for damages the onus of proving which is on him, he must suffer for the omission to do this. Here we say you have not shewn with any such certainty as a Judge or jury could act on, what damages you have sustained by our breach of contract. We say there is no evidence on which you can form any legal view as to damages at all. There is no basis for anything beyond nominal damages, but at any rate the damages should be assessed once for all. We also refer to *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Ch. 279; *Sedgwick on Damages*, 7th ed., p. 201, note on damages; *Lacey's Dig. of Railway cases*, vol. 2, p. 1098.

McCarthy, Q.C., and *Ermatinger*, Q.C., for the plaintiffs. The Court of Appeal did not intend to express any opinion as to the measure of damages; it had not before it the materials to enable it to do so, and the question is in no way affected by the decision of that Court. In an action

for breach of a contract no greater damages can be given on the ground of the wilful breach of it: *Thorpe v. Thorpe*, 3 B & Ad. 580; *Sykes v. Wild*, 1 B. & S. 587; *Mayne on Damages*, 4th ed., p. 35, with the single exception in actions for breach of promise of marriage. The motive, therefore, which led to the defendants' breach of this contract is entirely immaterial, neither is it material whether, as the plaintiffs allege, the defendants have acted fraudulently in breaking the agreement on the faith of which the bonus by-law was passed. The plaintiffs are entitled in damages to the fullest compensation for the loss they have sustained. This stipulation which has been violated was not merely subsidiary but a substantial term of the contract, but for which, the evidence shewed, many of the voters would not have voted for the by-law. The rule as to the measure of damages is to be found in *Hadley v. Baxendale*, 9 Exch. 341, as modified by recent decisions: *Jones v. Gooday*, 8 M. & W. 146. And that measure would entitle the plaintiffs to a sum equal to what would be required to build a work of the kind contracted for, and the amount awarded is very much less than that. To aver that the plaintiffs are only entitled to mere nominal damages is absurd: *Pell v. Shearman*, 10 Ex. 766; *Wilson v. Northampton & Banbury Junction R. W. Co.*, 9 Ch. 279; *McMahon v. Field*, 7 Q. B. D. 591, in which *Hobbes v. London & South Western R. W. Co.*, L. R. 10 Q. B. 111 is commented on and adopted. The mere fact that the damages are speculative is no objection: *Lancashire and Yorkshire R. W. Co. v. Gidlow*, L. R. 7 H. L. 517; *Keddie Gordon & Co. v. North British R. W. Co.*, 14 Ct. of Sess. Cas. 223; *Fraser v. Bell*, *ib.*, 811. There is one rule which, though not universal, is at all events applicable when no other is available, which is that the party is entitled to be put as nearly as possible in the condition he would have been in had the contract been performed: *Hide v. Thornborough*, 2 C. & K. 250. But even if that were not so the evidence shews that there were about 1,200 people a year accustomed to use the Church street station, and the loss to them by

the removal of this station would be 50cts actual outlay, and in addition there would be their loss of time. It is argued that the plaintiffs cannot recover this damage. But this is a loss sustained by the taxpayers, and the corporation represents them and any damages recovered will go in ease of the taxpayers. Then the same argument applies to the depreciation of property caused by the discontinuance of the station. The corporation is virtually a mere trustee for the taxpayers and entitled to sue for all the damages which the ratepayers have sustained. If the defendants' contention is correct that the Master should have assessed damages for all future time, then the fact that the Master has assessed the damages for only three and a half years would be pleaded as a bar to any further recovery: *Sedgwick on Damages*, 7th ed. vol. 1, 503 ; *Leach v. Amherst* (referred to by the Master), 20 Beav. 239 ; *Bickford v. Chatham*, 14 A. R. 32.

Robinson, Q. C., in reply. The plaintiffs were distinctly informed before the bonus was granted that the defendants were not able to guarantee the continuance of the station at Church street. The plaintiffs cannot claim as damages the cost of securing a right of way and building a line to Church street. That rule only applies where the act in respect of which the breach of contract exists, is the sole or principal object of the contract. Here the principal object of the contract was the bringing of the railway to St. Thomas, the coming to the station at Church street was a mere subsidiary term. Here the principal part of the contract has been performed. The cases referred to by the other side are upon the question whether the damages claimed were or were not too remote ; they have no application to this case because we contend not that the damages claimed are too remote, but that no damage at all has been proved: *Municipality of Kinloss v. Stauffer*, 15 U. C. R. 414.

April 9th, 1888. *BOYD, C.*—As stated by *Hagarty, C. J.* when this case was in appeal, 12 A. R. at p. 278: "The

main object of the bonus of \$50,000 seems to be treated all round, as the bringing the line to St. Thomas, the agreement as to trains for passengers and baggage at Church street being apparently subsidiary and a matter of local arrangement: (See *Brown and Theobald on the Law of Railway Companies*, 2nd ed., pp. 110, 111.)"

In ascertaining damages for the breach of this last term it must be considered that the stipulation as to the local service was intended to be of some benefit to the city. It may have been a minor matter, but was still of measurable importance. The obvious benefit intended by and in contemplation of both parties was, for the convenience of persons living in and others going to the west part of the city. All the passenger trains of the C. V. R. were to run to and from the small station on Church street for the purpose of checking baggage and the accommodation of passengers. But beyond this, which is expressed on the face of the contract, every reasonable presumption may be made as to the advantages which might have been derived from the performance of the agreement. Thus in *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Ch. 279, where a railway had failed to put a station at the place bargained for by the plaintiff, Bacon, V. C., thought it was an element to be considered in estimating his damages that he had lost the increase in value of adjoining land, which, had the station been there, would have been capable of being adapted for building purposes. Following up the same line, the Lord Chancellor said, in appeal, at p. 286: "A jury might, with perfect propriety, take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place to which traffic might have been attracted, or which might have been convenient to persons resident upon that estate." So in a later case of *Jaques v. Millar*, 6 Ch. D. at p. 160, Mr. Justice Fry, varying the expression of the rule to be found in *Hadley v. Baxendale*, 9 Exch. 341, and *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181, said: "I am entitled to have regard to the damages which may

be reasonably said to have arisen * * or which may be reasonably supposed to have been in contemplation of the parties as likely to arise, from the partial breach of the contract."

The failure to keep up the station at Church street might have, and might be expected to have, the effect of rendering the property in that neighborhood less desirable than it would otherwise be. Land and houses there might become less sought after and less saleable or rentable, and so might actually depreciate in value instead of receiving the upward impulse which might be anticipated as one result of fixing a station at the west part of the city. These are elements, as Lord Selborne says in *Wilson's* case, no doubt more or less of an indefinite character, yet proper for the consideration of the Master for the purpose of shewing how much less benefit has been derived by the city from the assessments and taxable returns over the area affected by this station in consequence of the railways' breach of contract. True, the actual depreciation is a matter which pertains to the property owners and not to the city as damages, but the lessened taxation resulting from this depreciation does not appear to me to be too remote a fact for consideration upon the reference. This is a result which might not unreasonably be expected to occur, and if it is established as a matter of fact to the satisfaction of the Master, it may as a matter of principle be included in his estimate of damage: *McMahon v. Field*, 7 Q. B. D. 591. As put by the Judge in that case, this loss, if proved, appears to be a probable result or consequence of the closing of the station. See also *per Bowen, L. J.*, in *Grébert Borgnis v. Nugent*, 15 Q. B. D. 92.

It is clear that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station, or the actual depreciation in value of the land individually owned in that neighborhood, cannot be reckoned as constituents *per se* of the damages suffered by the corporation. The city is not a trustee for these individual sufferers, and cannot recover damages for their use: *West v. Houghton*, 4 C. P. D. 197.

But there are disadvantages following the closing of the station in that part of the city which naturally and probably operate to lessen the value of taxable property, and so diminish the municipal income from this source. That this line of enquiry as to damages is not too remote or conjectural appears to be recognized in the observations of Osler, J. A., in *Corporation of Brussels v. Ronald*, 11 A. R. 605, 615. It helps materially to reach that which is the all important point, the ascertainment, as well as may be, of the pecuniary amount of the difference between the present state of things and what would have been if the contract had been fully performed. Stated broadly, the inquiry is, how much less benefit has been received by the municipality by reason of the railway service at one station being discontinued. That rule, enunciated by Richards, C. J., in *Cole v. Buckle*, 18 C. P. at p. 291, has been stated lately in England as the true measure of damages in a case like this of unusual character: *Wigsell v. The Corporation of the School for the Indigent Blind*, 8 Q. B. D. 357. The difficulty of ascertaining the amount is not a reason for withholding relief altogether: *Simpson v. London and Northwestern R. W. Co.*, 1 Q. B. D. at p. 277. I agree with the Master that this is not a case in which no damages are proved, or in which only nominal damages should be given, the result of which finding would be that the action should be dismissed, and probably with costs. But I am not able to accept the amount awarded, which is excessive and is based on an erroneous foundation. The serious difficulty, to my mind, is because of the possible effect of the one and main station at the eastern side of the city accumulating advantages at that point which might have been distributed in the western part had the small station been there maintained. However, the Master, upon whom the duty devolved, and before whom the witnesses were examined, has been able to discriminate and to find that there has been depreciation around the area of the abandoned station which has not been compensated for by the prosperity around the existing station. There is, it is said,

the distance of a mile between these two stations, and it may well be that the service at one point would not satisfy, as it should be satisfied, the requirements at the other points. At all events, that is what the city stipulated for—not one station, but two, and so situated that both sides of the town should be contemporaneously benefited. If the company admits that their small station is to be given up for all future time, then I think the damages should be assessed once for all: *Great Laxey Mining Co. v. Clague*, 4 App. Cas. 115. This may be done either by fixing one solid sum or by directing a yearly payment, as was suggested in *Wilson's* case, before Bacon, V. C., 9 Ch. App. 279. Had the Master fixed some considerably smaller sum estimated upon a satisfactory principle, I should not have interfered. As I understand his reasons and findings, he has come to the conclusion that there is a depreciation of \$40,000 in assessable value in the eastern part of the city, and of this, about \$12,000 is attributable to the default of the company. As the appeal was argued before me, and not disputed by the respondents, he came to this result because of evidence that \$40,000 worth of improvements had been made, which kept the assessments about the same in aggregate amount in 1881 and 1885. The witnesses Martin and Comfort say, “including the improvements, the assessed value is the same in these years.” But the improvements, it is said, would only be assessed at 50 per cent. of the value, and that would reduce the depreciation by one-half. Of this total depreciation the Master attributes one-third (about) to the breach of contract on the part of the railroad. But it would be only the rate levied upon this one-third (say $1\frac{1}{2}$ cents on the dollar) which would be the proper measure of loss to the city as plaintiffs. I may be in error in these details, but I only go into them for the purpose of pointing out how the damages may be, in one aspect of the case, rightly estimated—that is to say, the loss in taxation resulting to the city from the depreciation in taxable property which can be traced to or reasonably connected with the company's

default, forms a yearly standard which may be capitalized so as to fairly represent the money compensation to which the plaintiffs are entitled.

I have, perhaps, not exhausted the grounds upon which liability to damages can be placed. I have experienced the force of the observation of Mr. Justice Field in the *Wigsell Case*, 8 Q. B. D. 357, which is very pertinent to this case. "It is," he says, "one of a somewhat unusual character, and involves questions as to the principle upon which damages ought to be assessed, few questions upon which point are free from difficulty," p. 359.

As now framed, the report must be set aside. It is not my province to seek out what further, if any, grounds exist for the recovery of substantial damages. It is enough that the law and evidence does not warrant the conclusion to which the Master has come. The matter is therefore referred back for any further or other claim and evidence which may be adduced. I cannot but suspect, however, that some such case as this inspired or exasperated the utterance of a former Master in Chancery who differentiated between the functions of Court and Master by saying that all the difficult matters went to the Master and all the easy ones to the Court.

I may state that I have carefully read all the American cases cited, but they seem to me to be at variance with the views expressed by English and Canadian Judges as to what is admissible evidence of damage in cases of this kind. There is one case, not cited, of *Watterson v. Allegheny Valley R. W. Co.*, 74 Pa. St. 208, which goes the other way, and is in harmony with *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Ch. 279.

The costs of this appeal must be given in favour of the appellants.

A. H. F. L.

[CHANCERY DIVISION.]

THE OAKWOOD HIGH SCHOOL CASE.

Public Schools—Application for grant—Municipal corporations—Two-thirds vote—R. S. O. 1887, ch. 226, sec. 35.

Held, that under R. S. O. 1887, ch. 226, sec. 35, if on the application of a high school board to a municipality for a grant of money, less than two-thirds of the members present at the meeting of the council for considering the same, vote against the grant, it amounts to an affirmance and acceptance of the application, and finally fixes the municipality with the liability to raise the amount required ; and if such application is in the form of a proposal for a by-law authorizing the grant, (which *semble* it need not be), and less than a two-thirds vote is given against such by law, it must be deemed to have been carried, and cannot be repealed as in the case of an ordinary by-law, before it is acted on.

Re Board of Education of Napanee and the Corporation of the Town of Napanee, 29 Gr. 395, cited and followed.

THIS was an application on behalf of the Oakwood High School Board to make absolute an order *nisi* for a mandamus to compel the municipal council of the township of Mariposa to pay over \$4,000 demanded by the high school board, for a new school house, and also to quash by-law 358 of the municipality, under the following circumstances:

On the 23rd June, 1887, the high school board presented to the township council a requisition for the sum of \$4,000 for the erection of a school house in Oakwood, and also for permission to use a portion of the township land for the building and for a play-ground. This resolution was at the next council meeting on the 18th July rejected by a vote of four to one, the whole five members of the council being present. Thereupon the high school board informally notified the council that they would present for the consideration of the council a by-law granting the \$4,000, and would forego the requisition for a free site.

On the 8th of August, 1887, this by-law was presented to the council by the high school board, in pursuance of a resolution, and was read a first time, two voting for it and three against. The reeve declared the by-law to have passed its first reading, two-thirds of the members not

having voted against it. It provided for the acceptance of the requisition and the granting of \$4,000 as asked for, to build and equip a high school in the village of Oakwood.

On the 10th of October, 1887, the by-law was read a second and third time and declared passed on the same vote. It was by-law 352 of the municipality. On the 20th October, 1887, the by-law was registered and notice was duly published in certain newspapers.

The debentures, in pursuance of the by-law, were signed by the reeve and sealed with the seal of the municipality early in January, before the council of 1887 vacated office, but the treasurer did not sign them.

On January 20th, 1888, a demand was made for the debentures according to the by-law, but on the same day the new council passed by-law No. 358, repealing the former by-law 352.

On January 28th, a formal demand for the \$4,000 was served on the reeve, and the council not complying with it this motion was made.

A large amount of affidavit testimony was brought before the Court, which developed the above facts and also dealt largely with the question whether the by-law had the approval of the electors. It was made an issue at the municipal elections of 1888; but the Chancellor before whom the motion was made ruled that evidence of that kind would have no weight, because the by-law was not in fact submitted to the electors for approval, as it might have been.

The affidavits also showed that Mariposa is one of the wealthiest and most populous townships in the province, contributing one-fourth of the whole taxes of the county of Victoria. They further showed that the cost of granting \$4,000 would be 40 cents a year for twenty years for every 100 acres in the township. There was also a great deal of testimony to the efficiency of the Oakwood High School.

(1) Section 35 of the High School Act, as found in R. S. O. (1887) ch. 226, provides as follows:—

“In any case where a high school board may require the municipal council to raise or borrow a sum of money for the purchase of a school site, or the erection or purchase of any school-house, etc., such municipal council may refuse to raise or borrow any such sum when it is so resolved by a two-thirds vote of the members present at the meeting of the council for considering any by-law in that behalf.”

The motion came up for argument on April 24th, 1888, before BOYD, C.

Watson and *J. M. Clark*, for the Oakwood High School Board.

(1) The proceedings on July 18th, 1887, were nugatory, because no by-law was submitted. Section 35 says the council might refuse, etc., by a vote of two-thirds of the members present at a meeting *for considering any by-law*, which language could not be applied to the meeting of July 18th, and therefore the two-thirds majority then obtained went for nothing. By-law 352 having accepted the requisition there was no further discretion in the council, and they were compellable to furnish the \$4,000. By-law 352 having been registered was absolutely valid and binding and gave the school trustees a vested right to the money, and there was no jurisdiction to repeal it.

Moss, Q. C., and *D. J. McIntyre*, for the township of Mariposa. Under sec. 35 no formal by-law need be before the council, and the requisition having been rejected on July 18th there was an end to it; and no further requisition was presented before the 12th of August, after which time a requisition was too late under sec. 25, sub-sec. 6 of the Act. The motion to quash by-law 358 cannot succeed because express powers are given by the municipal Act to repeal any by-law, and the Court or school board cannot dictate to the council the mode in which the money is to be raised, even if the board had a right to the money. The county council having introduced a by-law discontinuing the Oakwood high school district, which has passed its

first reading, there can be no benefit from this motion. Then there was no demand made on the municipality of the village of Woodville for money to aid in the building of the school house. Woodville is still liable as part of the school district formed by the county council in 1876, under the Act of 1874, and continued by sec. 3 of the High School Act. This municipality should bear its share of the assessment for school purposes, if there be any.

Watson, in reply. A by-law is not a requisition, and the council in passing the by-law acted under the original requisition, though only granting a part of it; the requisition was therefore in time, before the first of August; and further, the registration of the by-law precludes the council from taking such objection. The fact of there being power to repeal cannot interfere with the rights of the school trustees under by-law 352. The motion to quash was merely precautionary; and the validity of by-law 358 could be determined on the mandamus motion. Under sec. 7 of the High School Act, the county council has power to discontinue a high school only on the recommendation of the Minister of Education and with the approval of the Lieutenant-Governor. Since the Act of 1877 the county council have no power to determine the limits of high school districts, and any by-law of the county council for such purpose would be quashed. Under sec. 32 of the High School Act, Mariposa, being the municipality within which the High School is situated, is alone liable to contribute to its support; and Woodville having been incorporated by an Act passed in 1884, 47 Vic. ch. 62, O., and separated from Mariposa, is separated for all purposes, and is no longer liable for the support of the Oakwood High School.

The following were cited on the argument: R. S. O. ch. 226, sec. 25, sub-sec. 6, sec. 32, sec. 35; *ib.* ch. 184, secs. 234, 283, 346-7, 351, 356; *Re Board of Education of Napanee and The Corporation of the Town of Napanee*, 29 Gr. 395; *Re Board of Education of the Town of Perth*,

39 U. C. R. 34; *Re Board of School Trustees of the City of Toronto*, 23 U. C. R. 203; S. C. 20 U. C. R. 302; *Re Niagara School Board*, 37 U. C. R. 529; 1 A. R. 288; 47 Vic. ch. 62, O; 37 Vic. ch. 27, sec. 38, (O.); 40 Vic. ch. 16, sec. 180; 48 Vic. ch. 50 sec. 33, (O.); *Bickford v. Chatham*, 14 A. R. 32; *Re Wolverton and Townships of South and North Grimsby*, 3 O. R. 293; *Re Chamberlain*, 45 U. C. R. 26; *Re Board of Education of Village of Morrisburg*, 8 A. R. 169; *Gosling v. Veley and Joslin*, 19 L. J. Q. B. 111, 137; *Mallough v. Municipality of Ashfield*, 6 C. P. 158; *Re Baird and Corporation of the Village of Almonte*, 41 U. C. R. 415; *Re Hill and the Municipal Council of Walsingham*, 9 U. C. R. 311; *Re Great Western R. W. Co.*, 23 C. P. 28; *Re Board of School Trustees of Town of Sandwich*, 23 U. C. R. 639; *Re School Trustees of South Fredericksburgh*, 37 U. C. R. 534; *Smith and the Municipal Corporation of the Township of Oakland*, 24 C. P. 295.

April 27th, 1888. BOYD, C.—The effect of legislation is to withdraw the village of Woodville from the high-school district of Mariposa. By the statute, 47 Vic., ch. 62, (O.) that village is constituted a corporation, separate and apart from the townships of Mariposa and Eldon in parts of which it was situate (sec. 1), and by sub-sec. 9 it was declared that the village shall cease to form part of such townships, and shall to all intents and purposes form a separate municipality with all the rights, privileges, and jurisdiction of an incorporated village of Ontario. Among those advantages is the right to have a high school apart from the township by virtue of R. S. O. (1877), cap. 226, sec. 4 and 15, &c. Therefore I give no effect to this objection.

As to the other matters argued, the *Napanee Case*, 29 Gr. 395, seems decisive against the objections urged by the municipality if the substance and not the form of the transaction is regarded. Before August 1st the school board made application to the council for a grant of \$4,000 for school purposes, and asked further the privilege “to build the new building contemplated on township property south

of the township hall, together with the use of the grounds in the rear thereof as a play-ground." This application was negatived by 4 to 1 at the meeting of the council held on July 18th, whereupon the school trustees present at the meeting said they would forego their claim to the benefits sought over and above the \$4,000 and would at the next meeting bring forward a by-law for the money grant alone. They did so at the next council meeting on August 8th, when the by-law 352 was voted on, with the result of 3 against, and 2 for. This, by the Statute, R. S. O. 1887, cap. 226, sec. 35, was not a refusal of the application and by the interpretation put upon that section was an affirmance and acceptance of the requisition. Before the passing of the original of this enactment, the municipal council had no option to reject but were under parliamentary obligation to raise by assessment, the amount required for school purposes, even though the money was to be applied towards the erection of a new building: *The Niagara Council*, 1 A. R. 288 and *Stormont Case*, 45 U. C. R. 460. The present legislation relieves them from this necessity only where there is "a two-thirds vote of the members present at the meeting of the council for considering the by-law in that behalf."

Upon the rejection of the application as originally framed no doubt the school trustees could have elected to request the council to submit the matter to the votes of the rate-payers; but they were not shut up to this course. They could (and they did) renew the application in a modified form and so reduce the opposition of the councillors as to obviate an appeal to the electors. The council might, perhaps, have refused to reconsider the matter in a modified form and have insisted on an appeal to the electors; and under sub-sec. 4 of sec. 35 they could afterwards have receded from this position and have acted as they did, that is, pass the by-law because of their inability to procure a two-third vote against it. A by-law is probably not essential but it is the usual course adopted as the statute recognizes and intimates; and such a by-law, if not negatived by a two-

thirds vote of the council, fixes the municipal district with liability to raise the amount required, which cannot in my opinion be repealed as in the case of an ordinary by-law, before it is acted on. The failure to reject by a two-thirds vote concludes the matter unalterably against the council and the obligation then becomes, as under the former law, absolute and imperative.

The applicants are, therefore, entitled to a mandamus upon the council to raise forthwith the \$4,000 and to the cost of this proceeding in the Court.

A. H. F. L.

[CHANCERY DIVISION.]

HARRISON ET AL. V. SPENCER ET AL.

Will—Period of distribution—Thelluson Act—39-40 Geo. III., ch. 98—32 Geo. III., ch. 1—Vesting subject to being divested—"Heirs-at-law."

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs at law." At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died.

Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take in substitution for the original legatee, and,

Semble, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

Held, also, that the Act against accumulations, commonly called the Thelluson Act, 39-40 Geo. III. ch. 9, which was passed after the Statute 32 Geo. III. ch. 1, by which English law was introduced into Canada and which did not extend in terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that Statute.

THIS was an action brought for the construction of the will and the distribution of the estate thereunder of Robert Harrison, deceased.

The plaintiffs were the nephews and nieces of the testator, who sued as well on behalf of themselves as of all others of their class, and the mothers and father respectively of three other nieces of the testator who were alive at his death, but had since died intestate and unmarried. The defendants were the surviving executors of the testator, the children of certain of his nieces, and his widow.

The testator died on October 19th, 1866, without issue, and the will in question was dated October 12th, 1866. By it the testator, after devising his dwelling house to his wife for her life, and making her certain bequests in lieu of dower, directed that at the death of his said wife the whole of his estate, real and personal, should be sold and the proceeds of such estate divided as follows: one tenth of the proceeds to one Hannah Thompson, and all the rest and residue to be equally divided amongst his nephews and nieces, "such bequests in the event of the death of any of those entitled to the same, previous to the period of distribution to go to their heirs-at-law." The widow accepted the benefits given her by the will in lieu of dower.

In their statement of claim the plaintiffs stated that they were desirous of having their share and interest in the testator's estate determined, and paid to them or otherwise settled, and that the testator's widow was willing (as she admitted in her statement of defence), that this should be done, conditionally on her being secured the payment of her annuity under the will, but that the executors claimed that they could not, without the direction of the Court, safely deal with the plaintiffs until after the death of the widow, and they therefore claimed that the will might be interpreted and the rights of all parties determined: that their respective shares became vested in them respectively on the death of the testator and that they had the right and power to dispose of the same absolutely: that it might be declared that the executors might, with the consent of the widow, distribute among the plaintiffs and the other surviving nephews and nieces of the testator, and the legal representatives of such of them as were dead, their respective

shares in the testator's estate, and that if needful the estate might be administered by the Court.

The action came on for trial at Owen Sound, on March 29th, 1888, before Boyd, C.

Kilbourn and Bishop, for the plaintiffs.

Creasor, Q. C., for the infants and the adult defendant Allan.

Morrison, for the executors and the widow.

The following cases were cited upon the argument: *Jull v. Jacobs*, 3 Ch. D. 703; *Theobald on Wills*, 2nd ed. p. 443; *Phillips v. Phillips*, W. N. 1877, p. 260; *Weatherall v. Thornborough*, 8 Ch. D. 261; *Jarvis v. Crawford*, 21 Gr. 1; *Ferguson v. Stewart*, 22 Gr. 364; *Wright v. Church*, 15 Gr. 413, 16 Gr. 192; *Hellem v. Severs*, 24 Gr. 320; *Will. on Executors*, 5th ed. p. 1101; *Jarman on Wills*, 5th Am. ed., Vol. 1, p. 598; *In re White and Hindle's Contract*, W. N. 1877, p. 260; *In re Russell's Trusts*, W. N. 1884, p. 52; *Chadbourne v. Chadbourne*, 9 P. R. 317; *Wood v. Armour*, 12 O. R. 146; *Ryan v. Cooley*, 14 O. R. 13; *Mays v. Carroll*, 14 O. R. 699; *The Peterborough Real Estate Investment Co. v. Patterson*, 13 O. R. 142; *Jenkins v. Drummond*, 12 O. R. 696; *In re Biggar*, *Biggar v. Stinson*, 8 O. R. 372; *Stobbart v. Guardhouse*, 7 O. R. 239; *Paradis v. Campbell*, 6 O. R. 632; 39-40 Geo. III. ch. 98; *Re Stevens*, *Stevens v. Stevens*, 14 O. R. 707.

April 9th, 1888. BOYD, C.—The residuary clause of the will as to the property now under consideration (which is personalty, consisting of the partnership assets of the testator) provides for its equal distribution amongst the testator's nephews and nieces who are alive at the time of his death. That gives a vested interest to those who answer this description. Then the will proceeds, "such bequests in the event of the death of any of those entitled to the same previous to the period of distribution, to go to their heirs-at-law." The period of

distribution fixed by the will is at the death of his widow, who is the tenant for life. She yet lives and this period has not arrived. Meanwhile some of the nephews' and nieces have died. The effect of the latter part of the will which I have quoted is, that the bequest is subject to be divested as to those who die before the time of distribution in favour of their representatives; *Smither v. Willock*, 9 Ves. 233. The representatives are intended to take in substitution for the original legatee, and for this reason it is to be inferred that by "heirs-at-law" the testator means to express that the benefit is to go to the persons who would inherit the personal estate, *i. e.*, the next of kin, *Doddy v. Higgins*, 9 Ha. App. xxxii.; 2 K. & J. 729; *Rees v. Fraser*, 25 Gr. 253. It is, however, not needful for me to pronounce definitely as to the meaning of the expression used "heirs-at-law." It is premature, and a contest may arise between conflicting claimants in the future, and it is sufficient now to decide that the estate is not presently divisible. There can be no distribution of the property prior to the death of the tenant for life, inasmuch as those entitled to share in the fund cannot be ascertained till then.

As to the point argued upon the accumulation of interest, (a) I am of opinion that there is no law prohibiting this during, the life of a person in being at the testator's death. The Act relied on of 39-40 Geo. III. ch. 98, commonly called "the Thelluson Act" was passed after the provincial constitutional statute, which introduced the English law up to its date, 32 Geo. III. ch. 1, C. S. U. C. ch. 9, and R. S. O. 1887, ch. 93. The Imperial Act does not extend to the colonies in terms, and the Canadian law appears to

(a) This point was as follows: More than 21 years had elapsed since the testator's death. It was therefore contended on behalf of the plaintiffs that under the Thelluson Act, 39-40 Geo. III., ch. 98, and R. S. O. (1887), ch. 93, any provision in the will looking to the administration of the estate for more than 21 years (beyond what was sufficient to provide for the annuity bequeathed to the widow) was void, and that the plaintiffs were entitled thereto, the vesting of this surplus being accelerated.
—REP.

be as it was in England before that statute: *Lord Southampton v. Marquis of Hertford*, 2 Ves. & B. 61.

Upon the last matter which was argued, I think that the terms of the will justified the sale of the partnership property as and when it was made. It became necessary to wind up the concern and the sale was an advantageous one, which should be confirmed, if confirmation is needed.

Costs of all parties out of the estate.

A. H. F. L.

[CHANCERY DIVISION.]

HOWE ET AL. V. CARLAW ET AL.

Will—Devise for maintenance—Medical and funeral expenses—Estate charged therewith.

A testator by his will provided as follows "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime and that the same shall be a charge upon my estate." The father and mother died and during their last illness certain expenses were incurred for medical attendance, nurses, &c., and after their death for funeral expenses and English solicitor's fees in endeavoring to collect the several accounts for same.

Held, that the expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate.

THIS was an action brought by William Frederick Howe, and another, against John Alexander Carlaw and Davidson Carlaw, as executors of one Robert Dixon, for a declaration that certain expenses were items of "maintenance" within the meaning of a devise in the will of said Robert Dixon, deceased

The plaintiffs were the representatives of the father and mother of the testator, who had died entitled to considerable property, and who by his will had provided for his father and mother by a clause in his will in these words, "I will and direct that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime and that the same shall be a charge on my estate." The father and mother recently died in England, and during their last illness certain expenses were incurred for medical attendance, nurses, and after their death for funeral expenses and solicitor's costs in England, in endeavoring to collect these accounts. This action was for a judgment declaring these expenses to be a part of the maintenance and a charge on the testator's estate.

The matter came up by way of motion for judgment on June 1st, 1888, before Ferguson, J.

J. Hoskin, Q.C., for the plaintiffs.

Foy, Q.C., for the defendants.

June 1, 1888. FERGUSON, J.—Counsel has cited no authority as a precedent for the judgment asked, but while no authority is shewn for it I know of no law against it. The will of the testator provided that the maintenance should be a charge on his estate, and as the items of the expenses claimed seem moderate in amount and would be reasonable to allow, I will order that they be declared a charge on the estate, and be directed to be paid. To save the expense of taking out administration in this country the amount can be paid to Mr. Hoskin on his undertaking to distribute it. Plaintiffs and defendants should both get their costs.

G. A. B.

[COMMON PLEAS DIVISION.]

DUNCAN V. ROGERS.

Way—Easement appurtenant to land conveyed—Prescriptive right to—Revocable license.—Agreement, construction of by court.

Some years prior to 1847, J. D. plaintiff's father, became the owner of lot 18 in 5th concession of York, and built the house, in which he lived up to the time of his death, on the north west half and near the sixth concession line. In 1847 J. D. purchased lot 19 adjoining lot 18 on the north, the occupiers of the eastern portion of which prior thereto and J. D.'s tenants since, used a trail or road running from the northerly part of the east half of 18 where the plaintiff's house stood, across the west half of 19 to the boundary between 18 and 19 where there were several trails or roads across the west half of 18 to a private lane leading in a westerly direction past J. D.'s house to the 6th concession. The trails ran through bush land, and no one was used continuously or exclusively, but as was convenient. In 1860, J. D. conveyed the east half of 19 to plaintiff, and plaintiff also acquired by devise from his father, who died in 1877, the north east quarter of 18, which adjoined the east half of 19 on the south. The west half of 19 J. D. devised to his daughter who had ever since been in occupation thereof, and the north west half of 18 to his son W. who was living with him at his death, who conveyed to defendant. Shortly after J. D. had conveyed the east half of 19 to him, the plaintiff with J. D.'s permission cut a new roadway outside of the woods on lot 18 connecting thereby with the lane to the 6th concession. In 1877, by an agreement entered into between plaintiff and W. D., in consideration of certain privileges granted to W. D., W. D. covenanted to permit plaintiff to have a right of way along the said lane from the 6th concession and extending 40 rods east of the centre of the lot, so as to allow plaintiff free communication from the lot 19 along said lane to the 6th concession.

Held, that there was no defined right of way existing in 1860 over the west half of 18 appurtenant to the east half 19 so as to enable plaintiff to claim an easement therein as granted under the words therefor in the conveyance of 1860 that the user of the roadway cut in 1860 being merely permissive, there was no prescriptive right thereto, but merely a license, which was revocable at any time, and was revoked by the father's death, and thereafter, as the evidence shewed, the user was regarded by W. as merely permissive, which was acceded to by plaintiff in 1877 by his then entering into the agreement of that date.

Per MACMAHON, J.—The jury are to find specific questions of fact to which the Court must apply the law on the facts so found. The construction of the agreement was for the Court, and its meaning was that the old lane has to be extended easterly in a straight line for 40 rods.

THIS was an action against the defendant for obstructing a right of way claimed by the plaintiff who in his statement of claim alleged that on the 2nd May, 1860, he purchased from his father, James Duncan, Sen., who conveyed to him, the east half of lot 19, in the 5th concession of the township of York.

3. That at the time of the conveyance, and prior thereto, he had been in occupation of the said east half, and there was a roadway running in a westerly direction from the house then occupied by the plaintiff upon lot 19, and running westerly through the west half of lot 19 for some distance, when the roadway turned and ran southerly across the west half of lot 18 until it met a lane or roadway running both in an easterly and westerly direction through the west half of lot 18, and leading out past the buildings upon lot 18 then occupied by his father, and forming a means of access to the 6th concession; and the said roadway had been used theretofore as appurtenant to the east half of lot 19, and as a means of ingress, egress and regress to and from the east half of lot 19; and a right of way was by the said deed granted to the said plaintiff, who has ever since used the said roadway as a right of way for the purpose of obtaining access to and from the east half of lot 19 to and across the west half of lot 18 to the 6th concession.

4. Shortly after the making of the deed, and about 25 years ago, a portion of the roadway running southerly across the west half of lot 18 towards the said lane was changed by arrangement between the plaintiff and his father; and he, with the agreement and consent of his father, cut a new roadway through and along the southerly side of some woods standing upon lot 18, and following the fence that formed the southern boundary of the woods; and made a roadbed there; and he has ever since used the roadway, so constructed across lot 18, in conjunction with the other parts of the said roadway and the lane hereinbefore described, and has ever since had ingress, egress and regress along the lane and roadway to and from the 6th concession to the east half of lot 19, with the full knowledge of the owner and occupant of lot 18, and without molestation or hindrance until the matters hereinafter complained of occurred; and he claimed that by reason of the grant and continued user he was entitled to an indefeasible right of way along the roadway and lane to and from the east half of lot 19 to the 6th concession.

5. That two or three months ago the defendant along that part of the new roadway made by plaintiff felled trees, and prevented the plaintiff from using the roadway, and prevented plaintiff from obtaining access to the 6th concession.

6. On the 16th January, 1877, the plaintiff's father, James Duncan, Sen., died, having previously made his last will, devising to the plaintiff the north-east quarter of lot 18, and to his son William Duncan the residue of lot 18; and subsequent thereto the plaintiff and his brother entered into the following agreement:

“ This agreement made this 20th day of March, 1878, between James Duncan, of the township of York, of the first part, and William Duncan, of the same place, of the second part, witnesseth that for and in consideration of the conditions and provisions hereinafter specified, said James Duncan, for himself, his heirs, executors, administrators, and assigns, doth by these presents covenant and agree to permit the said William Duncan, his heirs, executors, administrators, and assigns, to have and use the privilege and right of at all times taking and conveying from the spring and springs of water which he now uses from where he now has the water pipes laid under ground across said James Duncan's lot No. 19 in the 5th concession of the township of York. He also covenants to permit the taking up, repairing, laying down again and covering up said water pipes whenever repairing them is rendered necessary. Any injury that may be done to the crops in making such repairs to be paid for at a valuation by the said William Duncan, his heirs or assigns. It is clearly understood that said springs do not include the springs on said lot now used by the said James Duncan for his own purposes.

“ In consideration whereof the said William Duncan, for himself, his heirs, executors, administrators, and assigns, doth, by these presents, covenant and agree to permit the said James Duncan, his heirs, executors, administrators, and assigns, a full and free right of way along the lane where it now is, on lot 18 in 5th concession in the township of York, leading from the 6th line, and extending forty rods east from the centre of said lot, so as to allow free communication for all his and their teams, vehicles, &c., at all times from said lot No. 19, along said route to the 6th line. And said James Duncan, for himself, his heirs and assigns, covenants to perform an equal share of the labor required in repairing said lane; and that whatever gates may be in said lane requiring to be kept shut, it shall always be so done whenever he or they pass and re-pass said gate and gates.”

7. By reason of the said agreement, the plaintiff became entitled to a right of way from the north-east quarter of lot 18 along a roadway then in existence, running in a

westerly direction through the west half of lot 18 until it reached the easterly end of the before mentioned land, and then along said lane to the 6th concession.

8. A short time ago the defendant built fences across the said roadway so granted to the plaintiff, and otherwise refused and prevented the plaintiff from using the same.

9. The plaintiff pulled down the fences, and trespassed on the north-east quarter of lot 18.

The defendant, in his statement of defence, denied the allegations in the 3rd paragraph of the statement of claim.

3. The defendant says that James Duncan, Sen., was the owner of lots 18 and 19 in the 5th concession, and when he purchased the land it was in a state of nature, and he held and occupied the same until he conveyed the east half of lot 19 to the plaintiff.

4. When James Duncan, Sen., conveyed the east half of lot 19 to the plaintiff there was no roadway in existence or appurtenant to the said land so described and set out in the 5th paragraph, nor was there any roadway granted or conveyed to the plaintiff by the said deed as alleged.

5. After the conveyance to the plaintiff, and after he went to reside on the land, James Duncan, Sen., permitted the plaintiff to come from his dwelling on the lot so purchased through the west halves of lots 18 and 19, which was then, and for many years thereafter, a bush, into the said lane which led to the 6th concession; but there was no definite roadway leading from the plaintiff's place to the said lane; and the plaintiff from time to time, in coming to said lane, came through the said bush by various ways as he thought most convenient to reach the lane, but never by any defined or regular roadway.

6. The plaintiff's land, being the east half of lot 19, fronts on the 5th concession, which is a public and well-travelled road, and the plaintiff has a lane or well defined roadway leading from his premises into the 5th concession, and has for the last twenty years used the same as a means of ingress, egress and regress to and from his said premises.

7. The defendant says that the plaintiff has not for twenty years enjoyed as of right and without interruption any such right or easement as he claims.

8. That if any such easement or right ever did exist, as the plaintiff claims (which the defendant denies), the plaintiff has released his right to the same by the agreement mentioned in the 5th paragraph of the claim, and otherwise abandoned the same; and the defendant further says that he has been always ready and willing to carry out the terms of the said agreement, but the plaintiff has refused to perform his part.

The plaintiff joined issue on the statement of defence.

The action was tried before Galt, C. J., and a jury, at the sittings, in Toronto, on the 16th September, 1887, when the jury found that the plaintiff was entitled to the right of way as claimed in the fourth paragraph of the statement of claim; and that the defendant wrongfully obstructed the same; and they awarded the plaintiff 5s. damages. The jury also found that the extension of the lane should be wholly on the defendant's land; and judgment was given for the plaintiff for 5s., and costs.

In Michaelmas Sittings, 1887, *Tilt*, Q. C., obtained an order *nisi* to set aside the verdict, and to enter a nonsuit or verdict for the defendant, or for a new trial, upon the ground that the verdict was contrary to law and evidence; and upon the ground that the way or road claimed was not of such a definite nature as would pass under the deed from James Duncan, Sr., to the plaintiff; nor was it a way, at the time of the conveyance, appurtenant to the property conveyed or used and enjoyed therewith; nor had the plaintiff a right to the said way or road by length of user; and upon the ground that the learned Judge should not have left the construction of the agreement for the extension of the lane, made between the plaintiff and his brother William Duncan, to the jury, but the same should have been construed by the Court; and the verdict was erroneous, that the true construction of the agreement was, that the

lane should be extended easterly in a straight line, and that at the time the agreement was entered into it was the intention that the way or road should be abandoned; and the learned Chief Justice should have directed the jury that the plaintiff was not entitled to the use of the said way or road by length of user as the plaintiff had only a permissive right from his father, and afterwards from his brother, to use this road or way.

During the same sittings, *Tilt*, Q.C., supported the order, and referred to *Kay v. Oxley*, L. R. 10 Q. B. 360; *Watts v. Kelson*, L. R. 6 Ch. 166; *Langley v. Hammond*, L. R. 3 Eq. 161, 168; *Thomson v. Waterlow*, L. R. 6 Ex. 36, 42; *Goddard on Easements*, 3rd ed., pp. 136, 147, 160, 228-229, 494; *Earl de La Warr v. Miles*, 17 Ch. D. 536, 591-592; *Polden v. Bastard*, L. R. 1 Q. B. 156.

Fullerton, contra, referred to *Harris v. Smith*, 40 U. C. R. 33, 40; *Barkshire v. Grubb*, 18 Ch. D. 616; *Dixon v. Cross*, 4 O. R. 465; *Bayley v. Great Western R. W. Co.*, 26 Ch. D. 434, 442; *Goddard on Easements*, 3rd ed. 503, and notes, and cases there cited; *Beckett v. Grand Trunk R. W. Co.*, 13 A. R. 174.

March 10, 1888. MACMAHON, J.—Some years prior to the year 1847, James Duncan the elder, and father of the plaintiff, became the owner of lot 18, in the 5th concession of the township of York, and built the house in which he lived, up to the time of his death, (which took place on the 16th January, 1877,) on the north-west half of the lot and near to the 6th concession line. In 1847, he purchased the lot adjoining to the north, being lot 19.

Prior to purchasing lot 19, the occupiers of the eastern portion of the lot made use of a trail or road from about where the plaintiff's house now stands, on the said east half, running in a westerly or southerly direction by a circuitous route until it reached the boundary line between lots 18 and 19, where there appears to have been several trails or roads from that point running across the west half

of lot 18 until it met a lane or roadway running in an easterly [and westerly direction through the west half of lot 18, and leading out past the house and buildings occupied by the plaintiff's father, and forming a means of access out to the 6th concession.

After James Duncan, Sr., purchased lot 19, it is in evidence that his tenants on the east half of 19, followed the same trails or roads to reach the 6th concession.

On the 1st of May, 1860, James Duncan, Sr., conveyed to the plaintiff the east half of lot 19; and the plaintiff is the devisee under his father's will of the north east quarter of lot 18, which is immediately to the south and adjoining the east half of lot 19.

After the plaintiff received the deed from his father, he built a house on the east half of lot 19, in which he has since lived, which, according to the plans used at the trial, is less than half a mile from the 5th concession by a lane running from plaintiff's house. And, although the distance is shorter this way to Toronto, the principal market town, the 5th concession is hilly, and not as good a road as by the 6th concession road.

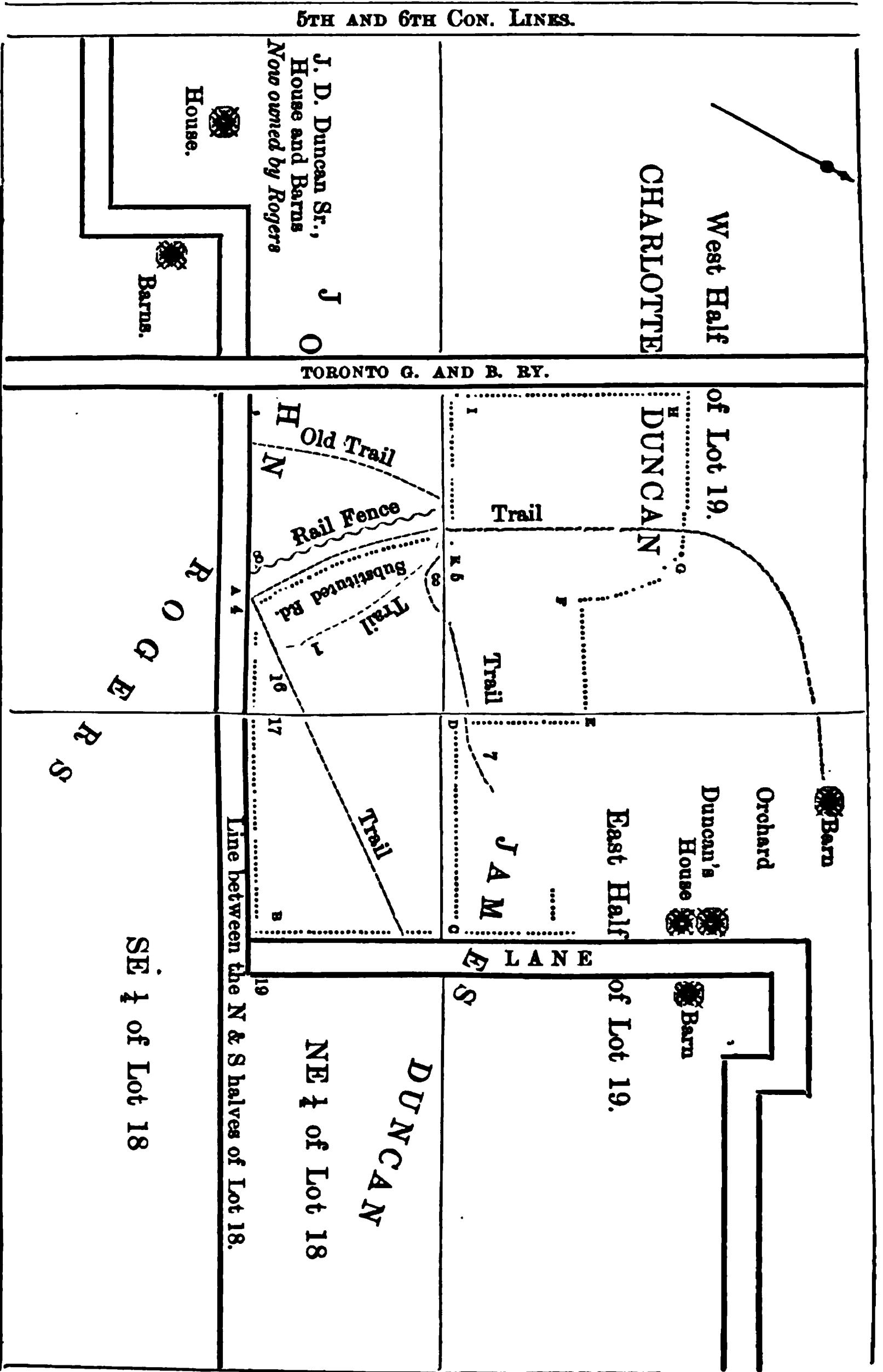
The distance from the plaintiff's house to the 6th concession by the way indicated on the plans, and, as alleged in the statement of claim, is about two miles.

James Duncan, Sr., devised the west half of lot 19 to his daughter Charlotte, who has since been in occupation thereof; and he devised the north-west half and south east quarter of lot 18 to his son William, who was living with his father at the time of the latter's death, and remained on the part of lot 18 devised to him, until 1881, when he conveyed to the defendant.

The sketch on p. 706 shews the position of the respective portions of lots 18 and 19, and how the same are geographically situated in relation to the 5th and 6th concessions.

If prior to the unity of title and possession by James Duncan, Sr., in 1847, there was a defined right of way existing from the east half of lot 19 over the west half of

4TH AND 5TH CON. LINES.



lot 18 to the lane, and such right of way was "appurtenant" to the east half of lot 19 ; and if, on the severance of the tenements by the conveyance to the plaintiff apt words have been used on the deed to him, then this case would come within the decisions in *Watts v. Kelson*, L. R. 6 Ch. 166, and *Kay v. Oxley*, L. R. 10 Q. B. 360, 366, and the plaintiff would have a right to enjoy the easement thus created. •

The law as expressed in *Thomson v. Waterlow*, L. R. 6 Eq. 36, which was followed in *Langley v. Hammond*, L. R. 3 Ex. 168, has been somewhat modified by the decisions of *Watts v. Kelson*, and *Kay v. Oxley*, all of which are referred to in the judgment of Patterson, J. A., in *Harris v. Smith*, 40 U. C. R. 33, in app. 50, at p. 70, where he sums up his view of the authorities thus : " That as no right of way would pass by way of implication except a way of necessity, which is not claimed, and as no right of way would pass under the general words of a conveyance except a defined way actually used at or before the date of the conveyance as *quasi* appurtenant to the premises, such an actual and defined way must be alleged and proved : and further that, being driven to rely on the general words in a conveyance, there must be general words appropriate to describe such a way, and that the word ' appurtenances ' is not an appropriate word, and will not by itself pass any which is not technically appurtenant."

In *Kay v. Oxley*, L. R. 10 Q. B. 360, Blackburn, J., at pp. 366, in discussing *Thompson v. Waterlow*, quotes from the judgment of the Master of the Rolls in that case as follows : " There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way, which, previously to such unity of possession existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties."

He then says : " I quite agree that there is a distinction. The way which had existed previously to the unity of

possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed." Then the Master of the Rolls continues: "I do not think that the Judges in *James v. Plant*, 4 A. & E. 749, intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute a grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place. Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used and enjoyed as appurtenant to the premises—it was used for the convenience of the man who was the occupier of the two, and when he ceases to be the occupier of the two, I think it is no longer appurtenant. That I think is a sound rule."

In *Langley v. Hammond*, L. R. 3 Ex. 161, at p. 168, Kelly, C. B., lays down the rule which should govern in the two classes of cases, as follows: "The law resulting from the numerous and complicated cases to which we have been referred, is simply this:—When the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction, if afterwards, by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property on his own land. But if, at a later period the properties fall again into the ownership and possession of different persons, and in the conveyance of the land to which the way was formerly attached, the words are found 'together with all ways, &c., used or enjoyed therewith, the effect of these words is

to revive the right that formerly existed, and which has been not extinguished, but only suspended. But since it does not appear that at any antecedent time there existed a right over one of these pieces of land, attached to the other piece of land, the effect of these words cannot make or revive a right of way that never before existed."

Commenting on this portion of the judgment, Blackburn, J., in *Kay v. Oxley*, L. R. 10 Q. B. at pp. 367-8, says: "It cannot make any difference in law, whether the right of way was only *de facto* used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right *de novo*, in the other merely revived. But it makes a great difference, as matter of evidence on the question, whether the way was used and enjoyed as appurtenant."

In the present case it is in evidence that prior to the year 1847, when James Duncan, Sr., became the owner of lot 19, the different occupants of the east half of that lot made use of the circuitous route through the west half of that lot, and came down through different portions of the west half of lot 18, coming out at various points on the lane leading to the 6th concession.

William Duncan, the plaintiff's brother, whose evidence was taken under commission, speaks of these different routes passing through the west half of lot 18 as being "trails," a number of which I have marked upon the sketch herewith by dotted lines.

In his evidence, in reply to question 44, "What is the state of the land on which these trails shewn on Exhibit "A" are? A. The land is bush land. In some places the trail is just at the edge of the land; and some of it runs through the bush." Q. 42. In the plaintiff's use of these trails, was he obliged to use any one of them; and, if so, which one? A. No; he used different ones. Q. 43. Why did he use different ones? A. Well, just as it suited him. I don't know why; I suppose it was more convenient. Q. 44. Was any one of the trails

more convenient than others at different seasons of the year; and, if so, which? A. While he lived in the old house, marked on plan "House" near "Orchard," the dotted line trail to the lane first described by me was the most convenient in the summer time; in the winter it was more convenient to turn off at point "14," and use the part between "14" and "8." This was up to 1877, the last time I remember of the part "14" to "8" being open. After that, so far as I know, he did not use "14" to "8." In winter, when hauling wood, it was more convenient to use the trail "15" to "16." In reply to question 28. Looking at Exhibit 'A,' what portions of lots 18 and 19 were bush land in 1881, when you sold to the defendant, lying between the Toronto, Grey and Bruce Railway and the lane running north and south past 'Duncan's House?' he replied that all those portions included in the sketch which I have marked in red pencil, and comprising those parts marked between the letters A, B, C, D, E, F, G, H, I, K, and from K to A, "was all practically solid bush; parts of it were thin; but it was all bush or woods."

It is evident that William Duncan, who lived with his father until the death of the latter, did not regard any of those outlets through lot 18, in the light of a roadway, so defined as to be used as a continuous way through that lot; nor was any particular one of these various routes used exclusively by the plaintiff; but all were used indifferently as suited his convenience. In fact that portion of the lands, within the bounds of the letters A, B, C, D, E, F, G, H, I, and K, included that part of lot 18, through which most, if not all of these trails, passed to reach the lane leading to the 6th concession, so that the description of these parts given by William Duncan in his evidence as being "all practically solid bush," almost precluded the possibility of there being a defined roadway which could be claimed by the plaintiff as an easement appurtenant to the east half of lot 19 under the deed to him.

The jury were not asked explicitly to find, nor have they found, that there was in 1860 or in 1862, a defined road

through the west half of lot 18; and we do not consider that the evidence would have supported such a finding, if it had been made.

Had there been a defined right of way existing in 1860, over the west half of lot 18, appurtenant to the east half of lot 19, it is likely an easement could have been claimed by the plaintiff as being granted to him by the words, "ways * * easements, privileges, and appurtenances whatsoever to the said parcel or tract of land * * or therewith used or enjoyed," contained in the conveyance to him under the authority of *Watts v. Kelson*, L. R. 6 Ch. 166, and *Kay v. Oxley*, L. R. 10 Q. B. 360.

The plaintiff also claims a right of way by prescription as set up in the fourth paragraph of the statement of claim.

The change of the roadway, which was claimed to have been granted as an easement by the conveyance to the plaintiff in 1860 to the roadway along the woods, claimed by prescription, the plaintiff in his evidence states was made in the year 1862; and he said: "My father told me to cut out a road for myself along the head of the clearing: that it would be better than going through the bush at night."

So that the plaintiff had an express verbal license from his father, the owner of the land, to cut this roadway; but this license to use the road the plaintiff's father could have revoked at any moment.

The general principle is, that an easement cannot be acquired by prescription, if the user has been enjoyed by permission. And in *Earl De La Warr v. Miles*, 17 Ch. D., at p. 591, Brett, L. J., referring to the 5th section of 2 & 3 Wm. IV. ch. 71, which is the same as sec. 38 of R. S. O. ch. 108, says: "The true interpretation of those words 'as of right,' seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has done it without that permission. If he shews that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing he had a right to do, whether the lord said 'you

may do it' or not; he has proved all that is necessary for him to prove * * So that in any tribunal where the adjudication of the facts is separated from the adjudication of the law, as in the case of trial by Judge and jury, it would be for the jury to say what were the acts done—whether they had been done for sixty years, and whether for sixty years they had been claimed to be done and done without regard to the permission of the lord. That is all they would have to find, and if they found that certain acts were done for the requisite period as of right, and without permission, then, as a pure question of law, the Judge would have to decide whether such acts so done could have been the subject-matter of a custom, prescription, or grant.”

But see the judgment of Cotton, L. J., at p. 595.

Under the above authority all the jury can be asked to do, or are entitled to do, is to find specific questions of fact to which the Judge must apply the law on the facts so found.

In the present case the jury have found both the facts and the law, deciding that the plaintiff had acquired an easement by prescription in the right of way mentioned in the fourth paragraph of the statement of claim.

In considering the question how an easement of the nature now claimed may be created, we cannot disguise from ourselves the fact that, if with the consent of the owner of land the use of mere trails through his woods, or cutting a road through his bush by an adjoining farmer to enable the latter to reach a concession line should, after twenty years, be considered as conferring an easement over the road through the woods to the person so using it, then many farms in the early and sparsely settled portions of this Province would have had rights of way running across them.

It is difficult to understand how a right of way could be acquired under such a state of facts; and so far I have not been able to discover a case going the length contended for by the plaintiff.

Assuming that the plaintiff had the permission, which he says in his evidence he had from his father, to cut out and use the roadway, commencing in the year 1862, then had he a continuous user of it for twenty years so as to acquire an easement by prescription, even supposing that the statute would run in his favour, where he enjoyed the right by permission?

His father died in 1877, and a mere parol license would, it seems to me, be revoked by the death of the licensor. The plaintiff's brother William, as devisee under his father's will, was the owner of the west half of lot 18; and he seems to have regarded any use made of the roadway by the plaintiff after his ownership commenced, not as one of right, but as one of liberty or license; and the plaintiff seems to have acted upon that supposition or understanding when he entered into the agreement set forth in the sixth paragraph of the statement of claim, to which I shall presently refer, for the purpose of giving him direct communication from lot 19 through the lane out to the 6th concession. William, in his evidence, is asked question 79, "Then from the time the road was opened the plaintiff had a right to use the road indicated by the red ink dotted line from his house to figure "3," and thence in a straight line to "6," (from "3" to "6" being the roadway mentioned) if he had chosen to do so? Ans. I cannot say he had the right; he had the liberty." Q. 80. After the direct road "3" to "6" was fixed up, it would be a good road in all kinds of weather? Ans. No, it would not. There was not much fixing done." So that the owner of this portion of lot 18 from 1877, did not regard this roadway as a road accessible at all seasons, and that the plaintiff enjoyed the use not as of right, but by permission.

The lane leading from the south terminus of this roadway, and over which the plaintiff passed to reach the 6th concession, was a private lane, passing through and over the lands of James Duncan. Sr., on lot 18, just as the roadway did; and at his father's death the plaintiff acquiesced in his brother William's contention that during the father's

life-time the user of the roadway and the lane was under a license which was then revoked ; for he concluded the agreement set out in the sixth paragraph of the statement of claim, whereby, for the use of the springs on plaintiff's farm granted to William, the plaintiff was granted a free right of way along the lane where it now is on lot 18, leading from the 6th concession line and extending forty rods east from the centre of said lot so as to allow a free communication for all his and their teams, vehicles, &c., from said lot 19 along said route to the 6th line, which would give the plaintiff a short and direct line from his house to the 6th concession.

The extension of the lane forty rods east would, instead of being produced in a direct line as a continuation of the old lane, make a jog of some two rods to the south so as to take the whole width of the continued lane from the defendant's land. The defendant has fenced and obstructed this so as to prevent the plaintiff using that portion of his land as a roadway, which is the cause of action in the seventh, eighth, and ninth paragraphs of the statement of claim.

The jury found that the extension of the lane for the forty rods should be wholly on the defendant's land.

The construction of the agreement is for the Court; and the language is plain and unambiguous, and can have but one meaning, which is, that the old lane is to be extended in a straight line for forty rods to where it meets the lane running southward from the plaintiff's house and barns.

It was urged by the plaintiff's counsel that if the lane was continued in a straight line the whole of the extended lane would be taken from plaintiff's own land; and there would, in that case, have been no necessity to give to William the right to use these springs if the extension was not to be over William's land. But the plaintiff had not the right to use the lane then in existence leading out to the sixth concession ; and the agreement expresses that it was to get the free use of that which formed the principal consideration for granting the use of the springs. The extension of the lane for the forty rods would have been of

no benefit to the plaintiff had he not secured the right to use the old lane out to the sixth concession.

The judgment entered for the plaintiff must be set aside, and judgment entered for the defendant, dismissing the action, with costs.

ROSE, J.—I concur in the result arrived at by my learned brother MacMahon. In the face of the agreement entered into between the plaintiff and his brother, I do not see how he can be allowed to claim by prescription. If he had acquired a right to a portion of the road leading to the line between the 5th and 6th concessions, he had acquired title to the whole, and the entering into the agreement was an act—to use the language of Denman, J., in *Tone v. Preston*, 24 Ch. D. 739, at p. 744—“done within the twenty years before action brought, which is an indication that the claim is not of right,” and “then the easement is not claimable;” or, as put on p. 743 of the same case, it was a “recognition by him in the course of the twenty years immediately preceding the action brought,” which shews “that he cannot claim it as of right.”

In *Earl De la Warr v. Miles*, 17 Ch. D. 535, at p. 596, Cotton, L.J., dealing with the claim being of right, expresses the opinion that where the right is enjoyed by permission given at the beginning of the user, such permission does not prevent the statute running. It is clear here that during the twenty years there has been an acknowledgment of the right of the owner of the fee, and that the user was by permission. The plaintiff's claim by prescription, therefore, clearly fails; and, in my view, there was nothing to leave to the jury with reference to it. The cases are collected in *Roscoe's N. P.*, 15th ed., pp. 725-6.

I agree that the evidence does not disclose a defined right of way which passed, or could have passed, to the plaintiff by deed.

The law is discussed in *Maughan v. Casci*, 5 O. R. 518.

I also entirely agree that the extension of the lane must be in a straight line.

[COMMON PLEAS DIVISION.]

BOND V. CONMEE.

Malicious and illegal arrest and imprisonment—Justice of the peace—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of “not guilty by statute”—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production at trial—Admissibility in Divisional Court.

The plaintiff having been arrested, convicted, and imprisoned for having liquors for sale near public works, writs of *habeas corpus* and *certiorari* were issued and on the return thereof he was discharged. Under a writ of *certiorari* directed to defendants, the convicting magistrates, the conviction, which was not under seal, was returned by defendants' solicitor to whom all the papers had been delivered by defendants, and who in his affidavit accompanying the return swore that the conviction returned was the one made by defendants.

Held, by ARMOUR, J., at the trial, in an action against the magistrates, that not being under seal it was not necessary that the conviction should have been quashed before action brought. *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 U. C. R. 577, followed.

Held, also, by the Divisional Court, that the return being made to a writ of *certiorari* directed to defendants, and not referring to the *certiorari* directed to the jailor under the *habeas corpus*, and in face of the solicitor's affidavit, a properly sealed conviction which however was not produced at the trial could not be received.

The notice of action stated that the cause of action arose “in the month of May last 1884, at said village of M. and in the town of P.”; and was served at defendant C.'s head office on his agent there, also at his place of residence, and on his solicitors. The statement of claim alleged the service of such notice. The only defence was “not guilty by statute R.S.O. ch. 73, sec 11,” the section requiring notice being section 10.

Held, by ARMOUR, J., and the Divisional Court, that the statement of time and place as well as the service was sufficient.

Oliphant v. Leslie, 24 U. C. R. 398, followed.

Held, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules, the particular section of the statute relied on should have been pleaded.

Held, also, following *Legacy v. Pitcher*, 10 O. R. 620, that in such an action the venue need not be laid where the offence was committed.

From the village of M., where the arrest and conviction took place and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction, over 50 miles distant, the company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation was issued under R. S. O. ch. 32, proclaiming this a public road; but subsequently the Dominion Government, by proclamation, issued under R. S. C. ch. 151, proclaimed the ten miles on each side of the supply road to be in the vicinity of a public work.

Held, by ARMOUR, J., and the Divisional Court, MACMAHON, J., doubting, that the village of M. was not within three miles of a public work under R. S. O. ch. 32.

Per GALT, C. J.—The place did not come within either Act, no proclamation having been issued at the time.

On application to the Divisional Court for leave to put in evidence the written order for the destruction of the liquor, which was not produced at the trial.

Per GALT, C. J.—The magistrate had no power to make the order, the authority to do so being based on R. S. O. ch. 32, which was not made applicable, and therefore the order was not admissible.

Per ROSE and MACMAHON, JJ.—The order for the destruction of the liquor, was not dependent on the conviction of the plaintiff, and came within R. S. O. ch. 73, and the destruction was an act under an order thereunder, which order must be quashed to avoid the protection afforded by sec. 4; but

Per ROSE, J., it should not now be received in evidence.

Per MACMAHON, J.—It should be received; and a new trial granted on this part of the case.

THIS was an action brought to recover damages for the malicious and illegal arrest and imprisonment of the plaintiff; and for the destruction of a quantity of liquor belonging to him.

The statement of defence was: "The defendants say they are not guilty." In the margin it was stated: "By statute R. S. O. ch 73, sec. 11, Public Act."

The cause was tried before Armour, J., without a jury, at Port Arthur, at the Summer Assizes of 1887.

It appeared that on the 21st May, 1884, an information was laid before the defendants, as Justices of the Peace, charging that the plaintiff had a cargo of intoxicating liquors on board a schooner at Michipicoten River,

"For the purposes of sale on or near the works of the Canadian Pacific Railway contrary to law; and that such sale would cause serious disturbance."

A warrant was issued thereupon, on which plaintiff was arrested, pending the trial of the charge; and was on the 23rd May convicted.

The conviction was:

"We, the undersigned Justices of the Peace for the District of Algoma, having heard the evidence of" &c., "find W. A. Bond," (the plaintiff,) "guilty of the charge in the information and complaint, &c."

"We also find, according to evidence, that the said W. A. Bond was twice previously convicted for an offence in contravention of an Act respecting the sale of intoxicating liquors near public works in the Province of Ontario, R. S. O. ch. 32 secs. 1, 2, 6.

And whereas the said W. A. Bond was this day convicted before us on the information and complaint of &c., "we therefore adjudge as per sec.

2 of above Act, and fine the said W. A. Bond in the penal sum of \$50, and imprisonment for six months in the common jail in this District at Port Arthur.

The plaintiff was thereupon taken to Port Arthur, and confined in the common jail there until discharged under writs *habeas corpus* and *certiorari*.

No written order by the magistrates for the destruction of the liquors was produced at the trial.

At the mouth of the Michipicoten River, where the schooner was, there was a village, called the "village of Michipicoten River," from which point to the Canadian Pacific Railway, then in course of construction, over fifty miles distant therefrom, the railway company had constructed a colonization road for the conveyance of supplies for the railway.

Subsequently on the 14th of June 1884, a proclamation was issued by the Dominion Government under R. S. C. ch. 151, sec. 2, proclaiming "All those portions of the Province of Ontario within ten miles of each side of a colonization supply road, which the Canadian Pacific Railway have constructed from the mouth of the Michipicoten River," to be in the vicinity of a public work within which the said Act shall be in force.

The conviction sent in return to the writ of *certiorari* was merely signed by the magistrates, and was not under seal.

The defendants at the trial asked leave to put in a properly sealed conviction. The learned Judge ruled that by reason of the return made to the writ of *certiorari* they were precluded from doing so.

The plaintiff before the commencement of the action, gave the following notice of action.

"To James Connée and P. W. Bell, Justices of the Peace in and for the District of Algoma.

Take notice that in one month after the service of this notice on you I, William Allan Bond, of the village of Michipicoten River, trader, intend to commence and prosecute an action for damages against you in the Queen's Bench Division of the High Court of Justice for Ontario, for malicious, illegal, and wrongful arrest, conviction, and imprisonment of

me, the said William Allan Bond, without any reasonable or probable cause, and for the malicious, illegal, and wrongful destruction of my goods and chattels, and for damages for my loss of time and injury to my business ; and for the recovery of the costs and expenses which I have incurred by reason of such malicious, illegal, and wrongful arrest, the same having been committed by you against me in the month of May last, 1884, at said village of Michipicoten River and in the town of Port Arthur."

This was dated the 7th July, 1884.

The notice was served on P. W. Bell, personally, and was served on the defendant Conmee's agent, at the head office of the defendant Conmee at Michipicoten River, and at defendant Conmee's place of residence at Port Arthur, and was also served on his solicitors.

At the close of the evidence the learned Judge reserved his decision, and subsequently, on 31st August, 1887 gave a considered judgment, as follows :

ARMOUR, J.—The objections taken to the plaintiff's recovery were : 1. That the conviction had not been quashed ; 2. That the notice of action was insufficient, inasmuch as it did not state with sufficient clearness the time and place of the offence, nor where the offence was committed ; 3. That the venue was laid at Toronto instead of in the district where the offence was committed ; 4. That there was no proof of the service on the defendant Conmee.

The first objection is answered by the cases of *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 U. C. R. 577, the conviction never having been sealed.

As to the second objection, the statute requires that the cause of action shall be clearly and explicitly stated ; and it has been held that time and place are essential to such clear and explicit statement. The statement of place is clearly sufficient ; and I, am of opinion, that the statement of time, "in the month of May last, 1884," is also sufficient according to the principle of the decision of *Oliphant v. Leslie*, 24 U. C. R. 398.

The third objection is answered by the case of *Legacy v. Pitcher*, 10 O. R. 620.

And as to the fourth objection, I find that the defendant Conmee was duly and in due time served with the notice of action.

There being no valid conviction to justify the imprisonment of the plaintiff, and no valid declaration of forfeiture of his goods, and no written order for their des-

truction, the defendants are without any justification for either the imprisonment or destruction of the goods; and it becomes merely a question what damages the plaintiff ought to recover for the injury he has sustained by his illegal imprisonment, and the illegal destruction of his goods.

The defendants claimed to have been acting under the provisions of R. S. O. ch. 32. No proclamation had been issued under the said Act, and Michipicoten River was over fifty miles from the line of the Canadian Pacific Railway, but from it to the line of the railway there had been, and was being constructed a road for the purpose of taking supplies, and having access therefrom to the line of the said railway.

I am of opinion that the village of Michipicoten River was not a place "within three miles of the line of any railway, canal, or other public work in progress of construction, * * * constructed by the Government of Canada, or of this province, or by any incorporated company, or by private enterprise," within the meaning of the said Act; and I find that the plaintiff was not guilty of any offence against the provisions of the said Act.

The plaintiff was in custody from the 19th of May, 1884, till after the 27th of June, 1884, when the order was made for his discharge, not less than six weeks in all, for which he is entitled to damages. He is also entitled to the costs of the proceeding by *habeas corpus* to procure his discharge. He is also entitled to the value of his goods at the place of their destruction, which would include the price he paid for them at the Sault Ste. Marie, and the cost of their transport to Michipicoten River; and he is also entitled to interest on their value till the date of recovering judgment.

And I assess the damages of the plaintiff in all at the sum of \$1,600.

In Michaelmas Sittings, 1887, a notice of motion was given by the defendants to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants, or for a new trial, on the grounds:

1. That his Lordship at the trial erred in ruling that the defendants were precluded by the alleged return to a writ of *certiorari* from giving evidence that the conviction in the evidence mentioned, and in question in this action, was actually drawn up, and signed, and sealed by the defendants, and from putting in in evidence at the trial of this

action a properly sealed conviction, there never having been in fact any such return to such alleged writ of *certiorari*.

2. That the alleged return to the said writ of *certiorari* being in return to a writ of *certiorari* issued in and of the writ of *habeas corpus* in the evidence mentioned, does not preclude the defendants from offering the evidence in the last preceding paragraph nereof mentioned; and on grounds disclosed in the evidence taken at the trial, and in the affidavit of the defendant Conmee this day filed.

3. For erroneous assessment of damages, respecting the destruction of liquors.

4. For leave to give evidence of the original order for the destruction of the liquors in question herein.

In Hilary Sittings, February 14, 1888, *McCarthy*, Q.C., supported the motion, and referred to R. S. C. ch. 151, p. 1849; R. S. O. ch. 32, sec. 1; R. S. O. ch. 73, secs. 4, 17; *Arscott v. Lilley*, 14 A. R. 283; *Chaney v. Payne*, 1 Q. B. 712; *Burns's Justice of the Peace*, 13th ed., 646; *Saffron Second Benefit Building Society v. Rayner*, 14 Ch. D. 406; *Hanns v. Johnston*, 3 O. R. 100; *Taylor v. Nesfield*, 3 E. & B. 724; 23 L. J. N. S. Mag. Cas. 169; *Addison on Torts*, 5th ed., 721; *Winen v. Marks*, 15 L. T. N. S. 591; *Martins v. Upcher*, 3 Q. B. 662, 668; *Breese v. Jerdein*, 4 Q. B. 585; *Oliphant v. Leslie*, 24 U. C. R. 398; *Jones v. Bird*, 5 B. & A. 837; *Paley on Convictions*, 5th ed. 491, 498; *Jacklin v. Fytche*, 14 M. & W. 381; *Leary v. Patrick*, 15 Q. B. 266; *Prickett v. Gratrex*, 8 Q. B. 1021; *Smith v. West Derby Local Board*, 3 C. P. D. 423, 428.

G. T. Blackstock, contra, referred to *Phillips v. London & South Western R. W. Co.*, 5 Q. B. D. 78; *Falvey v. Stanford*, L. R. 10 Q. B. 54; *Kelly v. Sherlock*, L. R. 1 Q. B. 686; *Beattie v. Moore*, L. R. 2 Ir. 28.

March 10, 1888. GALT. C. J.—Mr. McCarthy, in his opening, 'contended that the place at which the destruction of the liquors took place and at which the plaintiff was

arrested, came within the provisions of sec. 1 of R. S. O. ch. 32, and of R. S. C. ch. 151.

The learned Chief Justice has dealt with this in relation to the evidence given at the trial; and I agree with the opinion expressed by him, that the place where these transactions occurred was not within the provisions of either of the said Acts, no proclamation having then been issued.

He then contended that, inasmuch as the order for the destruction of the liquors (which was not produced at the trial, but was brought before us on the argument), had not been set aside, it is an absolute bar so far as the injury to the liquors is concerned. The answer, in my opinion, is, that as the authority to make such an order is based on the provisions of the above recited Act, the defendant had no power or authority to make such an order.

Mr. McCarthy then contended that the defendants could still put in a proper conviction. He referred to *Burns Justice of the Peace*, 13th ed., 646; but that has reference to returns to a *certiorari*. Moreover no proper conviction has in the present case been produced. It is true an affidavit has been filed, made by defendant Conmee, stating his belief that such a conviction exists; but it has not been produced.

In the notice of motion it is stated, "that the alleged return to the said writ of *certiorari* being in return to a writ of *certiorari* issued in and of the writ of *habeas corpus* in the evidence mentioned, does not preclude the defendants from offering the evidence in the last preceding paragraph mentioned."

This is an error. The conviction in question was returned to a *certiorari*, directed to the defendants themselves, and does not refer to the *certiorari* directed to the gaoler under the writ of *habeas corpus*. The return is made by the solicitor of the defendants, and contains the following statement: "The said Conmee, at the time of the said conviction, took charge and had the custody of all the papers, including warrant, information, depositions, convictions, orders, and proceedings on and in relation to said conviction, and, prior to his leaving for the works on which he is

contractor, as aforesaid, he, the said Conmee, brought all the papers, warrants, information, depositions, conviction, order and proceedings as aforesaid to me as such solicitor as aforesaid, and instructed me to look over the same, with a view to determining on their sufficiency, the said Conmee having at that time learned that proceedings were pending or about to be commenced to quash the conviction of said Bond, and to discharge him from custody."

He then swears to the form of conviction annexed to return of said writ.

After this affidavit it appears to me it would be most unjust to allow a new conviction to be filed; and, I may add, that, notwithstanding the affidavit of the defendant Conmee, I attach much greater credence to the statement made by Mr. Lewis at a time when there was no reason whatever to suggest that an erroneous conviction was returned, than to that of the defendant, made at a time when he was deeply interested.

The case of *Chaney v. Payne*, 1 Q. B. 712, appears to me conclusive against the contention of the plaintiff. The Court say, at p. 725: "We may therefore safely lay it down as law, that it is too late for a magistrate to draw up a second conviction after the first has been quashed. In the present case, however, the first never was quashed," (it is the same in the case now under consideration); "but we are of opinion that the decision in this Court, under the circumstances and for the purposes of this argument, has the same effect as quashing the conviction. That decision, indeed, proceeded upon the defect apparent on the commitment, and on the recital therein of a bad conviction; but as the recital was true, and the commitment bad, we think that the discharge of the plaintiff according to that decision put an end to the proceedings, and rendered it equally incompetent to the defendant to draw up any other conviction upon the original information, or to take any other steps in the matter, as if the conviction had been actually quashed."

The third objection is, that the assessment of damages, as respects the destruction of the liquors, is erroneous.

I have already expressed my opinion on this objection.

The fourth application is an application for leave to give evidence of the original order for the destruction of the liquors in question herein. I have already referred to this as if the order had been produced at the trial, and have stated that, under the circumstances of this case, the defendants had no power to make such an order.

Mr. McCarthy then contended there had been no notice of action, to which Mr. Blackstock, on behalf of the plaintiff, replied, that such want of notice was not taken in the notice of motion. Mr. McCarthy cited several authorities in support of his contention; but, in the view I take of the case, it is unnecessary to refer to them. The only plea filed by the defendants is: "The defendants say they are not guilty;" and in the margin is stated: "By statute, Revised Statutes Ontario, ch. 73, sec. 11, Public Act."

By the 14th paragraph of the statement of claim, the defendants aver that "one month before commencing this action the plaintiffs caused to be delivered to and served on the defendants, a notice in writing of the intended action, on which notice the cause of action, and the Court in which the same was to be brought, were clearly and expressly stated." This is not denied by the defendants. The only section referred to in the defence is sec. 11, the section requiring notice of action is sec. 10.

By Rule 145 of the O. J. Act it is declared: "Nothing in these Rules contained shall affect the right of any defendant to plead not guilty by statute. And every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had."

What then was that effect?

In *MacLennan's* Judicature Acts, at p.299, it is thus stated: "Where a plea of 'not guilty' by statute is pleaded, Reg. Gen. Trinity Term, 1866, No.21, will still be applicable"; and this must be so, otherwise a plaintiff would have no notice whatever as to any matter of special defence on which the defendant might rely. As for instance, in the present case, the claim against the defendants is made up of several

charges against them for acts done by them, and could be no intimation that the defendants relied on a want of notice of action.

The rule referred to is: "In every case in which a defendant shall plead the general issue intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "by statute," * * together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise—otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament, and such memorandum shall be inserted in the margin of the issue and of the *nisi prius* record."

It is true that by rule 148, the silence of pleading is no admission; but the rule contains an exception as follows: "Save as above otherwise provided, the silence of a pleading as to any allegation contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation."

What then had been previously provided ?

It had been expressly declared that nothing in these rules contained shall affect the right of any defendant to plead not guilty by statute; and every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute has heretofore had. Then, at the time the rule was passed, it was necessary that in pleading not guilty by statute, the defendant should point out not only the statute, but the clause of the statute on which he relied.

By sec. 147 "Each party in any pleading, not being a petition or a writ of summons, must allege all such facts not appearing in the previous pleading, (if any,) as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not so raised on the pleadings would be likely to take the opposite party by surprise."

It appears to me this renders it clear that where a defendant pleads not guilty by statute, he must, by reference to the section as required by the General Rule above mentioned, point out those on which his defence is based. The same objection was taken at the trial; and the learned Chief Justice has found that it was duly served; and also that the form was sufficient on the authority of the case cited by him, in both of which opinions I concur.

The motion must be dismissed, with costs.

ROSE, J.—As to the question of the sale of the liquors having been within three miles of any public work, I agree that there was evidence upon which such finding could have been and no doubt was rested, and we would not be justified in interfering with the finding.

I have had much more difficulty in dealing with the application to receive in evidence the alleged order for the destruction of the liquor, which was not produced at the trial, and the effect of such order, if produced.

Mr. McCarthy argued that if received it afforded complete protection to the magistrates under sec. 4 of R. S. O. ch. 73, as it had not been quashed.

To this Mr. Blackstock answered, that when ch. 32 was passed incorporating the provisions of ch. 73, sec. 4 of ch. 73 was by its language confined to cases under sec. 3, and that the amendment by 41 Vic. ch. 8, sec. 11, (O.), enlarging the provisions of said sec. 4 to all cases under secs. 1 and 2, did not apply to ch. 32.

This argument is met by reference to the language of 41 Vic., which enacts that sec. 4, "as amended shall be deemed to have been in force on and from the 1st day of January last," *i. e.*, the day of the coming into force of the Revised Statutes. Thus ch. 73 as amended must be read into ch. 32.

Then is the order for the destruction of the liquor, an order within the meaning of ch. 73?

After much consideration and hesitation I have come to the conclusion that it is.

Sec. 6 of ch. 32, provides for a justice of the peace, &c., on the complaint under oath of three voters, issuing a warrant to search for liquor, and, if found, to seize the same.

Sec. 7 provides that if the owner or keeper be known to the officer seizing the liquor, he shall forthwith be summoned before the justice by whose warrant the liquor was seized; and, if he fails to appear (no provision is made in case he does appear) or in case he is not known or summoned, and it appears to the satisfaction of the said justice that the liquor was kept or intended for sale or barter within contravention of the Act, *it shall be declared forfeited* with any package in which it is contained, and *shall be destroyed by authority of the written order* to that effect of the said justice, &c. And the owner or keeper of such liquor, shall pay a fine of \$40 and costs, or in default thereof be committed to prison for three months.

Disregarding the very inapt language used and the imperfect provisions of the section, it would seem that two things were contemplated: 1. The seizing and destruction of the liquor after adjudication that it was kept or intended for sale or barter in contravention of the Act; 2. The trial, conviction and punishment of the person bringing such liquor into the prescribed territory, if he can be found.

The seizure and destruction of the liquor is not dependant upon the trial and conviction of the offender unless he be known to the officer making the seizure.

Assume a case in which he was not known, and the magistrate ordered the seizure of the liquor, adjudicated that it was kept or intended for sale or barter in contravention of the Act, and ordered its destruction, it would seem difficult to hold that such order was not one coming within the words "conviction or order," found in ch. 73, while an adjudication under the same section that the offender was guilty of keeping such liquor in contravention of the Act, and an order ordering him to pay the fine and costs, or in default to go to jail, was a conviction or order within the meaning of that Act.

The distinction between an order and conviction is pointed out in the sixth edition of *Paley* on Convictions, at pp. 171-177.

At page 173, orders of bastardy are referred to. The Statute 18 Eliz. ch. 3, directs the justices to take order for the keeping of the bastard child, &c.; and it is pointed out that the proceeding was more for the purpose of indemnity to the parish than of punishment for an offence.

At page 176, *Basten v. Carew*, 5 D. & R. 558, is referred to. There the question arose upon the 16th section of 11 Geo. II. ch. 19, which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, not leaving sufficient goods for a distress, and authorizes, on the lessor's request, two justices on their own view, to deliver possession. Trespass having been brought against two magistrates for turning a tenant out of possession under the Act, a record of the proceedings, drawn up conformably to the statute, was given in evidence; and the Court held that it was a complete defence to the action, though the justices did not appear to have acted on the *oath* of the landlord.

In the present case, the order was made without jurisdiction, if we are right in upholding the decision of the learned Chief Justice upon the first point, so that the action would be brought under section 2 of ch. 73. *Hunter v. Gilkinson*, 7 O.R. 735, is an authority that want of jurisdiction does not save the necessity of quashing an order of conviction, even while the defendant has been discharged under a writ of *habeas corpus*.

A consideration of that section has not assisted me; for it would seem that three classes of actions are there contemplated: 1. For an act done by a justice of the peace in a matter in which by law he has not jurisdiction; 2. Or in which he has exceeded his jurisdiction; 3. Or for any act done under any conviction or order made, or warrant issued by any such justice in any such matter. It is of course only in a case arising under the third class that a conviction or order or warrant must be quashed to avoid the protection of section 4.

The question would still remain, was the destruction of the liquor an act done within the first or third class, *i. e.*, without or under an order such as is contemplated by the statute?

On the whole I am of the opinion that an order under section 6, for the destruction of the liquor, is such an order as is contemplated by ch. 73, and destruction of liquor under such an order would be an act done within the third class.

But the order in question was not produced at the trial; and the learned Chief Justice founded his judgment as to the destruction of the liquor upon its absence. He said "There being * * no valid declaration of forfeiture, and no written order for their destruction, the defendants are without any justification." * *

Should we now receive it?

This question has given me much anxious thought; but I am unable to decide it in the defendants' favor for the following reasons:

It was not returned with the other papers annexed to the writ of *certiorari*.

1. It may be it was not strictly called for by the *certiorari*; but it was an order made on the information referred to in the writ, and, if it had been in the possession of Mr. Lewis, Conmee's solicitor, who made the affidavit accompanying the return, it would have been referred to in some way; or, if in his possession and not referred to, one would expect an affidavit from Mr. Lewis on this motion as to why, being in his possession, it was not produced at the trial.

2. It is not shewn to have been in the hands of the persons who destroyed the liquor—if they had any written order in their possession, or acted upon any at the time. No one of the parties so acting, has made an affidavit to support this motion.

3. It was not produced at the trial, and the reason is not now given for its non-production.

Mr. Blackstock asserted on the argument of this motion that it was withheld, so as, if possible, to prevent him

shewing that the defendants ordered the destruction of the liquor. It having been withheld is certainly open to this construction ; and, if withheld for such purpose, should not now be received.

4. The paper now produced has seals attached to it. The one opposite the defendant Conmee's name was evidently placed after his signature was made. This is a circumstance of suspicion which leads one to caution in receiving it at this late stage.

If it should be received, a new trial should be granted as to this part of the case, if the damages could be severed, as possibly they could be, and such new trial could only be upon payment of the costs of the last trial, and of this motion. Such relief, having in view the probable expense of a new trial, would be of doubtful value.

I also agree that we should not allow a valid conviction of the plaintiff now to be put in by the defendants, not only for the reasons given by my lord the Chief Justice, but also because I would have difficulty in not coming to the conclusion that the defendants had not, by their conduct, shewn a want of *bona fides*.

The proceedings were instituted under sec. 6 of ch. 32; and, as I have pointed out, under sec. 7, the plaintiff was liable to a fine of \$40 and costs. The defendants, not satisfied with the punishment provided by that section, drew up an order of conviction as under sec. 2, which enabled them to inflict a fine of \$40 and imprisonment for six months, whereas under sec. 7 imprisonment could only be directed in default of payment of the fine.

Why they did this, it is difficult to understand, unless they were actuated by some ill feeling against the plaintiff; for there is nothing in the language of either secs. 6, 7, or 2, which should have led any intelligent man to do so.

The question as to local venue was not taken in the motion paper; and I think this is not a case in which one would feel inclined to review the decision in *Legacy v. Pitcher*, 10 O. R. 620, even if it has been opened for recon-

sideration by the Court of Appeal in *Arscott v. Lilley*, 14 A. R. 283; for here the trial took place within the district in which it is said the place of trial should have been originally named. It was named at Toronto, and changed by order. So the defendants had their rights preserved to them by such order.

In other respects I concur in the judgment just delivered; and agree that the motion must be dismissed, with costs.

MACMAHON, J.—I have had an opportunity of reading the judgment of his Lordship, the Chief Justice, and my brother Rose.

I am not at all satisfied that the learned Chief Justice of the Queen's Bench was right in finding that the village of Michipocoten River was not a place "within three miles of the line of any public work." My opinion is, that it was such a place; and my view is strengthened by the proclamation issued by the Dominion Government on the 14th June, proclaiming "All those portions of the Province of Ontario within ten miles of each side of a colonization supply road which the Canadian Pacific Railway have constructed from the mouth of the Michipocoten River," and was so proclaimed under the Act respecting the preservation of the peace in the vicinity of public works.

I fully concur in the conclusions reached by the learned Chief Justice of this Division, and by my brother Rose, regarding the plaintiff's right to recover against the defendants in respect of the plaintiff's conviction, and the imprisonment on such conviction for selling intoxicating liquor near public works, such conviction having been quashed when returned on *certiorari*.

It was not necessary to make a return of the magistrate's order for the destruction of the liquor, for that was not called for, nor was its return to the Court required by the writ of *certiorari*.

As pointed out by my brother Rose, the seizure and destruction of the liquor is a proceeding altogether independent of the trial and conviction of the offender;

and the order for so doing being an "order" within the scope of "conviction or order" in ch. 73.

This order not having been quashed, would, if it had been produced at the trial, have afforded a defence to that portion of the plaintiff's case.

Donald MacLennan, the constable who had the warrant for plaintiff's arrest and the order for the destruction of the liquors, was called as witness for the plaintiff, and said he had two warrants, and was asked by Mr. Blackstock: "Q. Did you destroy these liquors? A. Yes. Q. How did you come to do that? A. I had an order from the magistrates to do that; I think the order was signed by both of them. Q. What became of the order, do you know? A. I think the order called for being returned to the magistrates after the destruction of the liquor; it was returned—I am confident the order was returned."

It is true this order was not produced at the trial, nor was its absence accounted for; but it has been produced on this motion, and has endorsed upon it the certificate of the justices that the liquor was destroyed under the order; and also a certificate of one of the constables that the destruction of the liquor did take place under that order.

I think the defendants should be allowed a new trial on this part of the case upon payment of \$800, and the costs of the last trial and of this motion, within one month after taxation.

[COMMON PLEAS DIVISION.]

MCARTHUR ET AL. V. THE NORTHERN AND PACIFIC JUNCTION
R. W. CO. AND HENDRIE, SYMONS & CO.

Railways—Dominion Railway—R. S. C. ch. 109, sec. 6, sub-sec. 12 : sec. 27
—*Line built through lands under Ontario timber license—R. S. O. ch. 26*
—*Timber cut within and outside six rod belt—Limitation of action.*

The defendants a railway company, incorporated under an Act of the Parliament of Canada, built their railway through land in this Province, the fee of which was in the Crown, but which was under a timber license issued by the Ontario Government, under R. S. O. ch. 26, to the plaintiffs. The defendants cut down and removed the timber both within and outside the six rod limit mentioned in sub-sec. 12 of sec. 6 of R. S. C. ch. 109. The timber was all cut more than six months before action brought.

Held, that under the said sub-section the timber cut within the six rod limit became the property of the railway, and that the loss of the trees was damage or injury sustained by the plaintiffs by "reason of the railway," under sec. 27 of R. S. C. ch. 109, and the action was therefore barred by that section by reason of its not having been brought within the six months.

THIS was an action brought by the plaintiffs, who were timber licensees under the Ontario Government, for damages sustained by them by reason of the defendants having built their railway through the land covered by the plaintiff's license, and having cut down and removed and converted to their own use the timber, to a great distance, on both sides of the railway, both within and outside of the six rod belt, mentioned in R. S. C. ch. 109, sec. 6, sub-sec 12.

The cause was tried before Street, J., without a jury, at Toronto, at the Winter Assizes of 1888.

The learned Judge reserved his decision and afterwards delivered the following judgment in which all the material facts are stated.

Osler, Q.C., and *Creelman*, for the plaintiffs.

Walter Cassels, Q.C., and *E. Martin*, Q.C., for the several defendants.

February 27, 1888. STREET, J.—The defendants, the railway company, are incorporated under an Act of the Dominion Parliament, and their line of railway has been

constructed through certain lands in this Province, the fee of which remained in the Crown, but which at the time of the construction of the railway were included in certain timber licenses issued by the Ontario Government, under R. S. O. ch. 26, to the plaintiffs.

The plaintiffs complain that in the autumn of 1884 the defendants entered upon these lands, and built their railway through them, and cut down and removed and converted to their own use the timber upon their line of railway for a great distance on both sides of it, both within and outside of the belt of six rods in width mentioned in sub-sec. 12 of sec. 6 of R. S. C. ch. 109

It is admitted that none of the trespasses complained of took place at a date later than December, 1885, more than six months before this action was commenced.

The defendants, other than the railway company, are the contractors under them ; and it is agreed that any questions which may arise between the defendants themselves are to be dealt with in any reference which may be ordered.

The main question argued before me was as to whether the plaintiffs' rights as to any or all of the trespasses complained of are barred by sec. 27 of R. S. C. ch. 109, which provides that " all actions or suits for indemnity for any damage or injury sustained by reason of the railway company shall be commenced within six months next after the time when such supposed damage is sustained, or, if there is continuation of damage, within six months next after the doing or committing of such damage ceases, and not afterwards."

The rights of the plaintiffs under their license are defined in sec. 2 of R. S. O. ch. 26, which enacts that the " licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being upon the nominee the right to take and keep exclusive possession of the lands so described * * and * * shall vest in the licensee thereof all rights of property in all trees, timber and lumber cut within the limits of the license during the time thereof whether * * cut by authority of the

holder of the license, or by any other person, with or without his consent; and such licenses shall entitle the holders thereof to seize in revendication, or otherwise, such trees, timber, or lumber when the same are found in the possession of any unauthorized person, and also to institute any action against any wrongful possessor or trespasser, and * * to recover damages, if any."

So far as regards the timber, if any, cut by the defendants beyond the six rod belt, it is conceded by them that the limitation of time fixed by the 27th section of the Railway Act does not apply, and that the plaintiffs are entitled to a reference as to this.

So far as the six rod belt is concerned, the plaintiffs concede that, subject to the constitutional question as to the right of the Dominion Parliament to limit the right of action to six months, or any other time, the 27th section of the Railway Act would bar their right, if the effect of sub-sec. 12 of sec. 6 of that Act be to vest in the railway company the property in the timber cut or removed under that section; but they contend that this is not the true construction of that clause, and that any timber cut under the authority of that clause still continues the property of the owner, and that the damages resulting to them from the conversion of it to their own use by the defendants is not a damage arising "by reason of the railway;" and is therefore not covered by the clause restricting their right of action to the period of six months.

The clause of the Act under which the trees have been cut upon the six rod belt is sub-sec. 12 of sec. 6; and it provides that "the company may fell or remove any trees standing in any woods, lands or forests where the railway passes, to the distance of six rods from either side thereof."

The point does not seem to have been raised in any of the cases to which I have been referred, and I have not been able to find any authority upon it.

In the somewhat analogous case of the tenant of a wooded farm which he has rented for agricultural purposes, the timber which he may cut without waste for the

purpose of clearing the land clearly belongs to him : *Lewis v. Godson*, 8 C. L. T. 70 ; 15 O. R. 252.

The rule seems a reasonable one. The landlord obtains compensation for his timber in the increased value of his land for agricultural purposes, and the tenant has the timber as the reward for his labour in clearing the land ; and disputes are prevented between the landlord and the tenant which might arise as to whether the timber had been cut in such a manner as to be of the greatest advantage to the landlord.

A railway company cutting timber under this sub-section 12 is not bound to clear the land to any greater extent than it deems necessary ; and the landowner may, therefore, find himself in the position of a landlord whose land has been merely "slashed" by his tenant ; but, on the other hand, the railway company is clearly liable to the landowner for the whole damage done under the sub-section ; and as no directions are given by the Act as to the manner of cutting or removing the timber, or as to the disposition of it when cut, and as the privileges given to the railway company are such as I do not think could have been given had the intention of the Act been to leave the property in the timber after it had been cut still in the landowner, I am clearly of opinion that the company had the right to make use of any timber which they cut under the sub-section in question, and committed no wrongful act in treating it as their own. The loss of the trees in question was, therefore, in my opinion, a damage resulting to the plaintiffs "by reason of the railway," and the action is within the 27th section of the Act.

The plaintiffs' contention with regard to the timber cut upon the right of way itself, is, that being part of the freehold the company should have proceeded to ascertain the compensation to be paid for the damage done, under the 13th and following sub-sections of the 8th section of R. S. C. ch. 109, and that if they had done so the 27th section would not have applied ; and that they should not be allowed to obtain, because they have acted as trespassers, a benefit

which they could not have claimed had they proceeded properly under the directions of the Act.

The rights of the plaintiffs under these timber licenses are somewhat peculiar. They have a right to the possession of the land, and they become the owners of the timber upon it immediately upon its being severed; but the fee in the land and the ownership of the timber until severance remained in the Crown.

The plaintiffs were, however, clearly, I think, persons interested in lands which might suffer damage from the exercise of any of the powers granted, and might have compelled the company to proceed to ascertain and pay the compensation for the damage they were doing to his property before they were permitted to continue their works. But the damage having been done the plaintiffs have proceeded by action of trespass to recover the damages which they have sustained, and these damages being clearly damages sustained by "reason of the railway" within the meaning placed upon those words by the cases in which they have been under consideration, I think that the claim as to them is also within the 27th section of the Act. See *Follis v. Port Hope, &c. R. W. Co.*, 9 C.P. 50; *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616; *Booth v. McIntyre*, 31 C. P. 183; *Foran v. McIntyre*, 45 U. C.R. 288; *Beard v. Credit Valley R. W. Co.*, 9 O. R. 616; *Corporation of Brock v. Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372; *Re Ontario and Quebec R. W. Co. and Taylor*, 6 O. R. 338; *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.

Unless that section is of no validity the plaintiffs' rights are I think barred by it, excepting as to timber cut outside both the right of way and the six rod belts.

The plaintiffs contend that because the defendants have not shewn any order in council of the Ontario Government authorizing them to take possession of the land in question for the purposes of their railway, they are not entitled to set up that any of the damage done to the plaintiffs was done by reason of their railway. No authority was cited for this proposition, and the fact being admitted that the

railway had been constructed and was in actual operation under the provisions of an Act of the Dominion Parliament before the action was brought, I am unable to see upon what grounds it is to be refused the protection of the clause for the reason suggested.

As it is contended by the defendants that this 27th section is invalid as being *ultra vires* the Dominion Parliament, and they desire an opportunity of raising and arguing the point, I reserve for the present formal judgment in the case in order to afford to the defendants time to give notice under sec. 6 of 46 Vic. ch. 7 (O.), and have the question properly brought up.

The learned Judge, on May 23, 1888, delivered formal judgment, as follows :

1. "I find and declare that the plaintiffs' right to recover damages for the alleged trespasses, so far as such trespasses, if any, were committed upon or relate to the timber alleged to have been cut upon or removed from the right of way of the defendants, the railway company, and the width of six rods upon each side thereof, is barred by section 27 of R. S. C. ch. 109 ; and I dismiss so much of the action as relates thereto.

2. I find and declare that the plaintiffs are entitled to recover from the defendants, as damages, the value of the timber, if any, cut or removed by them, or any of them from those portions of the land in the statement of claim mentioned, lying and being more than six rods distant from the right of way of the said railway company ;" and he directed a reference to ascertain the amount of the damages.

A D I G E S T
OF
ALL THE CASES REPORTED IN THIS VOLUME,
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ACCIDENT.

See RAILWAYS AND RAILWAY COMPANYS, 1.

ALIENATION.

Restraint on.]—*See* WILL, 1.

AMENDMENT.

By adding parties.]—*See* PARTNERSHIP, 3.

ARREST.

See MALICIOUS ARREST.

ASSAULT.

Want of evidence of.]—*See* JUSTICE OF THE PEACE.

ASSESSMENT AND TAXES.

Tax sale—Duty of treasurer at and after sale—R. S. O. ch. 180, secs. 129, 137.]—At a sale of land for taxes, the treasurer is bound under R. S. O. ch. 180, sec. 137, if he sells any particular part of a lot, to sell in preference such part as he may consider best for the owner to sell first, and section 129 does not relieve him from this duty; and for such purpose he must obtain the necessary information to enable him to arrive at a sound judgment thereon.

Section 129 applies to the duty of the treasurer *before* the sale; section 138 to his duty *at and after* the sale, and before he grants his certificate.

History of the provisions of these sections traced.

Semble. It is sufficient to sell so much of a lot as may be necessary to secure payment of the taxes due, and the particular part need not be determined until the certificate is given to the purchaser.

Where the treasurer, before he granted his certificate, knew that there was a house upon the lot, and although within a few minutes walk of his office, did not take the trouble to ascertain on what part of the lot the house was situated, but gave his certificate describing the part sold so as to include the greater part of the house.

Held [affirming on this point the judgment of Proudfoot, J., 13 O. R. 600,] that the sale not having been fairly conducted was invalid. *Haisley v. Somers*, 275.

ASSIGNMENT.

For the benefit of Creditors.]—See PARTNERSHIP, 3.

ATTACHMENT OF DEBTS.

Undistributed share under a will—Debts due and accruing due—Receiver—Garnishor also one of the garnishees—Personal and representative capacity—Interpleader—O. J. A. r. 376.]—The share of a testator's estate, to which a judgment debtor is entitled under a will directing the same to be sold and divided, may be attached under O. J. A. Rule 370, though at the time of the garnishee proceedings, the share is unascertained and undisturbed.

Thus in the present case, a testator left his real and personal property to the defendants as executors and trustees, on trust to sell and divide among his children (of whom S. S. was one) and died in May, 1883. Subsequently J., one of the defendants, obtained judgment against S. S., and the usual attaching order and summons upon which an order

was made, upon notice to the defendants, requiring them to pay the debts due by them to S. S. when the same should become payable. After the attachment J. S. recovered judgment against S. S., and J. M. S. was by an order made without notice to the defendants, appointed receiver, and after his death the plaintiff A. S. was appointed receiver in his place. Notice of the making of these orders was given to the defendants after they were made.

In 1886 the defendants, as executors as aforesaid, sold the testator's estate, and realized the share of S. S., and paid it over to J., under the attaching order, and afterwards distributed the rest of the estate. A. S. who had demanded the money from the defendants, before they paid it over, and with whom S. S. was joined as a co-plaintiff, now sued the defendants, claiming payment of the amount of S. S.'s share to him.

Held, that the attaching order was properly made, and the defendants were bound by it, and the payment made by them under it, discharged them under marginal rule 376, and the action must be dismissed, with costs.

In re Cowan's Estate, 14 Ch. D. 638, and *Leaming v. Woon*, 7. A. R. 42, followed in preference to *Webb v. Stenton*, 11 Q. B. D. 518.

Held, also, that the fact of J., the attaching creditor, being one of the executors in whose hands the share of S. S. was attached, did not invalidate the garnishee proceeding as he attached in a personal capacity, whereas he held the fund attached in a representative capacity.

Held, lastly, that the defendants were not bound to interplead on receiving notice of the appointment of the receiver. *Stuart v. Gough et al.*, 66.

ATTORNEY.

Right of County Attorney to enter jury room.]—See EVIDENCE.

BANKS AND BANKING

See COMPANY, 4 & 5.

BANKRUPTCY AND INSOLVENCY.

Rent distrained for prior to assignment—Taking possession.]—See LANDLORD AND TENANT, 1.

Forfeiture of lease by assignment.]—See LANDLORD AND TENANT, 2.

BANNS.

Publication of.]—See HUSBAND AND WIFE, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange drawn in one country and payable in another—Law governing legality of consideration—Domicile.*]—Defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The domicile of the defendant was, at the time, in Ontario, and the drawees were also domiciled there. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York Stock Exchange, and that, as such, it was

under the law of New York, an illegal contract, and invalid.

Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario; for the contract of the drawer was to pay the money at the place where he entered into the contract, in default of the drawee paying, and the domicile of the drawer did not affect the rule as stated. *Story v. McKay*, 169.

2. *Third person becoming party after maturity without any consideration—Liability—Endorsement of payment of interest on back of note—Extension of time of payment—Discharge of surety.*]—Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time of payment, such third person is not liable thereon.

Croft v. Beale, 11 C. B. 172, followed; and *Currie v. Misa*, L. R. 10 Ex. 153, 1 App. Cas. 554, and *McLean v. Clydesdale Banking Co.*, 3 App. Cas. 95, distinguished.

An endorsement on the back of a note of the payment of interest up to a future date beyond the maturity of the note, in the absence of evidence of mistake, is to be deemed an extension of time for the payment of the note to such date, so as to discharge a party thereto who is merely a surety for the payment thereof. *Ryan v. McKerral*, 460.

3. *Payment in full by acceptor to holder—Part payment by drawer to*

holder—Right of acceptor to recover surplus—Deed of composition and discharge—Covenant not to sue.]—

B. & Co. discounted with defendants a draft drawn by the former on the plaintiff for the amount of his indebtedness which plaintiff accepted, but did not pay at maturity. Subsequently B. & Co. made an assignment for the benefit of their creditors; and afterwards plaintiff also becoming embarrassed, procured his creditors, including B. & Co.'s estate to execute a deed of composition and discharge whereby plaintiff's creditors agreed to accept 50 cents on the dollar on their respective debts, payable thirty days from the date of the deed, one D. being surety for the said payment within the time limited. There was a covenant by plaintiff and his surety to pay the composition to the several creditors on or before a fixed date, and by the creditors with plaintiff not to sue for their several debts, and if plaintiff and his surety should observe and perform the covenants, &c., on their part, the creditors would release and deliver up the bills, notes, &c., held by them; and if any of the creditors should sue for their debts the deed might be pleaded in bar. The defendants refused to execute the deed of composition. They proved for the amount of the draft with other indebtedness against B. & Co.'s estate and received a dividend of 50 cents and threatened to sue plaintiff, and he, not knowing that they had received the dividend, paid them the amount of the draft, which they applied on B. & Co.'s general indebtedness, and were thus paid in full, but on discovering the facts he brought this action to recover the amount received by them. The plaintiff had not paid B. & Co. the 50 cents or any part thereof.

Held, that the covenant not to sue in the deed of composition and discharge was not absolute, but merely conditional on payment being made within thirty days; and as plaintiff had not paid B. & Co. within the time limited he could not have claimed a release and set up the covenant as a bar to the action, (Rose, J., doubting): that the defendants were trustees for B. & Co. to the extent of 40 cents in the dollar of the amount received from plaintiff, and that B. & Co.'s estate could compel the defendants to refund such amount to them, and therefore plaintiff had no right of action against the defendants.

Per ROSE, J.—Had the deed of composition and discharge been effective the defendants could not have recovered from plaintiff more than sufficient to satisfy their own claim in full either in their own right or as trustees for B. & Co. *Andrews v. The Bank of Toronto*, 648.

BILLS OF SALE AND CHATTEL MORTGAGES.

For past indebtedness and to secure future advances.]—See FRAUDULENT PREFERENCE.

Necessity of Registration.]—See SALE OF GOODS, 4.

BOND.

Construction of.]—See PRINCIPAL AND SURETY, 2.

BRIDGES.

Approaches to.]—See MUNICIPAL CORPORATIONS, 7.

Liability for repairs to.]—See MUNICIPAL CORPORATIONS, 11.

BY-LAW.

Without local limits of its operation described.]—See MUNICIPAL CORPORATIONS, 1.

Submission of, to vote of electors.]—See MUNICIPAL CORPORATIONS, 3.

To open a road.]—See MUNICIPAL CORPORATIONS, 4.

To open a free road merely for the purpose of avoiding travelling on a toll road.]—See MUNICIPAL CORPORATIONS, 5.

For drainage.]—See MUNICIPAL CORPORATIONS, 10.

CANADA TEMPERANCE ACT.

1. *Insufficient proof of prior offences—Police Magistrate—Separate commission for county and town—Jurisdiction—Adjournment.*]—The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against said Act, and that this was the third offence. The certificate produced to prove the prior convictions, simply stated that Elias Clark was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act.

Held, that there is no power to punish as for a third offence unless

there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed.

Semble, that if the conviction were well drawn, the similarity of name of the person mentioned in the certificate and the defendant would afford proof of identity.

The magistrate had a commission as a police magistrate for the county of Halton, and an independent and subsequent commission for the town of Oakville; and he took the information and part of the evidence at Georgetown, and then adjourned to Oakville, and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction.

Held, following *Regina v. Riley*, 12 P. R. 98, that the magistrate had jurisdiction to sit in Oakville under his commission as police magistrate for the county, and he consequently had jurisdiction to adjourn as he did. *Regina v. Clark*, 49.

2. *Police Magistrate—Appointment of more than one for county—Evidence of—Conviction, validity of—R. S. C. ch. 106, sec. 17.*]—An information was laid before K., who described himself as “one of Her Majesty’s police magistrates in and for the county of Oxford; and he was similarly described in the summons and conviction. K.’s commission was issued on the 12th January, and appointed him police magistrate in and for the county of Oxford. It was urged that Woodstock and Ingersoll were two towns in the county, and that each had, at the time of information laid, a population of more than 5,000 inhabitants, so as to have, by law, each a police magistrate, which it must be presumed

was the case here ; and therefore K. could not be police magistrate for the county which included these towns, as there could not be more than one police magistrate for the same county. On motion to quash the conviction,

Held, that the application must be refused ; that there was no judicial knowledge of the fact of such towns containing such population, and no knowledge of it by affidavit or otherwise : that even if there was more than one police magistrate, the other might have been appointed subsequently to K. ; and the appointment of such other, and not K., would be void ; and under R. S. C. ch. 106, sec. 17, the conviction must be deemed sufficient. *Regina v. Atkinson*, 110.

3. *Power of justice to inflict greater penalty than \$50—Reasonable discretion.*]—Under the Canada Temperance Act, sec. 100, convicting justices may inflict a reasonable penalty in excess of \$50. Remarks as to their discretion in so doing. A penalty of \$60 allowed to stand. *Regina v. Cameron*, 115.

4. *Conviction for second offence—Enquiry as to previous conviction—Necessity for first finding as to subsequent offence—Sec. 115—Peremptory effect of—Certificate of previous conviction—Mode of drawing conviction.*]—Sec. 115 of the Canada Temperance Act, 1878, which provides for the case of a previous conviction, requires that the magistrate "shall in the first instance enquire concerning such subsequent offence only, and if the accused is found guilty thereof he shall then, and not before, be asked whether he was so previously, convicted," &c.

Held, that the language of the

section is peremptory ; and therefore to give a magistrate jurisdiction thereunder to enquire as to a previous conviction he must first find the accused guilty of the alleged subsequent offence. In this case, which was a conviction for a second offence, this was not done ; and the conviction was therefore quashed.

Quære, whether a certificate of a previous conviction is sufficient *prima facie*, evidence of identity of the accused with the person of the same name so previously convicted.

Informations and convictions should be drawn with care so as to specify that the offence is against the second part of the statute. *Regina v. Edgar*, 142.

5. *County of Simcoe—Territorial limits—Stipendiary magistrate for judicial district of Parry Sound—Jurisdiction of.*]—Defendant was, in the village of Parry Sound, convicted by the stipendiary magistrate for the district of Parry Sound for a sale in the township of Humphrey, of intoxicating liquor contrary to the Canada Temperance Act, 1878.

Held, that the township of Humphrey was within the territorial limits of the county of Simcoe, and that the Canada Temperance Act being in force in the county of Simcoe, was therefore in force in the township of Humphrey.

Judgment of ARMOUR, J., in *Regina v. Shavelear*, 11 O. R. 727, qualified.

Held, also, that the township of Humphrey formed also part of the district of Parry Sound for certain judicial purposes, and that the stipendiary magistrate for the district of Parry Sound had jurisdiction to try offences against the Canada Temperance Act committed in that township. *Regina v. Monteith*, 290.

6. *Police magistrate appointed for county exclusive of city—Right to sit in city to hear offence arising in county—Appointment “during pleasure”—Necessity for place set apart to hear offences—Alternative jurisdiction—Constitutional law—Appointment of police magistrates.*]

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate for the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the Canada Temperance Act, did unlawfully sell intoxicating liquors, &c., upon which G. issued, at the city of Brantford, a summons requiring defendant to appear at his G.'s office, “Court House, Brantford,” before him or such justices of the peace for the said county as may then be there, to answer said charge. On an application for a prohibition to prohibit G. from hearing the complaint;

Held, by ROBERTSON, J., that under 49 Vic. ch. 4, sec. 9, (O) and sub-secs. G. had authority to hear, adjudicate and determine the matter of the complaint at the city of Brantford.

Held, also, that G.'s commission was properly issued during pleasure; and that it was not necessary under sub-sec. b, sec. 103 of the Canada Temperance Act, that the town of Paris should be excluded from the operation of the commission; but *quære*, whether the police magistrate could try an offence arising within the said town.

Held, also, that there was nothing

in the statute which required the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor, and under 48 Vic. ch. 17, sec. 4, (O), G. had the right to occupy the court room.

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition.

Held, also, that the appointment of police magistrate is not *ultra vires* of Legislature of Ontario.

Regina v. Bennett, 1 O. R. 441, followed.

On appeal to the Divisional Court, the judgment was affirmed. *Regina v. Lee*, 353.

7. *Conviction—Information laid after defendant has left jurisdiction of magistrate—R.S.C. ch. 178, sec. 13, construction of.*]

The words “being within the jurisdiction of such justice” in sec. 13 of the Summary Convictions Act, R. S. C. ch. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the information was laid; and an order *nisi* to quash a conviction for an offence against the second part of the Canada Temperance Act on the ground that the defendant not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information, nor to summon the defendant from without his jurisdiction, was discharged, with costs. *Regina v. Bachelor*, 641.

CASES.

Baker v. Saltfleet, 31 U. C. R. 386, followed.] See MUNICIPAL CORPORATIONS, 4.

Board of Education of Napanee and the Corporation of the Town of Napanee, Re, 29 Gr. 395, cited and followed.] See PUBLIC SCHOOLS.

Bowes v. Shand, L. R. 2 App. Cas. 455, followed.] See SALE OF GOODS, 2.

Carter v. Grassett, 10, S. O. R. 105, followed.] See SURVEY.

Clegg v. The Grand Trunk R. W. Co., 10 O. R. 713, followed.] See RAILWAYS AND RAILWAY COMPANIES, 3.

Cornish v. Abington, 4 H. & N. 548, discussed.] See INSURANCE.

Cowan's Estate, In re, 14 Ch. D. 638, followed.] See ATTACHMENT OF DEBTS.

Coyne v. Lee, 14 A. R. 503, followed.] See FRAUDULENT PREFERENCE.

Crofts v. Beale, 11 C. B. 172, followed.] See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

Currie v. Misa, L. R. 10 Ex. 153, 1 App. Cas. 554, distinguished.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

Darling v. The Midland R. W. Co., 11 P. R. 32, followed.—See RAILWAYS AND RAILWAY COMPANIES, 3.

Doe Corbyn v. Bramston, 3 Ad. & El., followed.]—See LIMITATION OF ACTIONS, 1.

Donnelly v. Donnelly, 9 O. R. 673, followed.] See HUSBAND AND WIFE, 2.

Dover and Chatham, Re, 12 S. C. R. 321, followed.] See MUNICIPAL CORPORATIONS, 10.

Essex and Rochester, Re, 42 U. C. R. 523, distinguished.] See MUNICIPAL CORPORATIONS, 10.

Haacke v. Adamson, 14 C. P. 201, followed.] See MALICIOUS ARREST, 2.

Helm v. Port Hope, 22 Gr. 273, distinguished.] See MUNICIPAL CORPORATIONS, 3.

Ings v. President, &c, of the Bank of Prince Edward Island, followed.]—See COMPANY, 5.

Irwin v. Bank of Montreal, 38 U. C. R. 375, followed.] See PROBATE.

Kitson v. Julian, 4 E. & B., 854, followed.] See PRINCIPAL AND SURETY, 2.

Leaming v. Woon, 7 A. R. 42, followed.] See ATTACHMENT OF DEBTS.

Legacy v. Pitcher, 10 O. R. 620.] See MALICIOUS ARREST, 2.

Lindley v. Lacey, 17 C. B. N. S. 578, commented on.] See CONTRACT.

Misener and Wainfleet, Re, 46 U. C. R. 457, followed.] See MUNICIPAL CORPORATIONS, 10.

Mosely and C. Coke Co., Re, The —Barrett's Case, 4 DeG. J. & S. 756, followed.] See COMPANY, 5.

McDonald v. Stuckey, 31 U.C.R. 577, followed.] See MALICIOUS ARREST, 2.

McLean v. Clydesdale Banking Co., 3 App. Cas. 95, distinguished. See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

McNaughton v. Wigg, 35 U.C.R. 111, distinguished.] See LANDLORD AND TENANT, 4.

McNeely v. McWilliams, 13 A.R. 321, commented on.] See CONTRACT.

North of Scotland Mortgage Co. v. German, 31 C. P. 349, commented on.] See MORTGAGE, 4.

North of Scotland Mortgage Co. v. Udell, 46 U. C. R. 511, commented on.] See MORTGAGE, 4.

Norrington v. Wright, 115 U. S. Rep. 188.] See SALE OF GOODS, 2.

Oliphant v. Leslie, 24 U. C. R. 398, followed.] See MALICIOUS ARREST, 2.

Pitchford v. Davis, 5 M. & W. 2, referred to.] See COMPANY, 1.

Regina v. Bennett, 1 O. R. 441, referred to.] See CANADA TEMPERANCE, ACT, 6.

Regina v. Ingham, 5 B. & S. 260, referred to.] See EVIDENCE.

Re Romney and Mersea, 11 A.R. 712, followed.] See MUNICIPAL CORPORATIONS, 10.

Regina v. Riley, 12 P. R. 98, followed.] See CANADA TEMPERANCE ACT, 1.

Regina v. Rowton, 10 Cox C. C., followed.] See CRIMINAL LAW.

Regina v. Shavelear, 11 O.R. 727, qualified.] See CANADA TEMPERANCE ACT, 5.

Sanderson v. Aston, L. R. 8 Ex. 73, followed.] See PRINCIPAL AND SURETY, 2.

Saunders v. Breakie, 5 O. R. 603, commented on.] See LANDLORD AND TENANT, 3.

Smith v. Keal, 9 Q. B. D. 340, distinguished.] See SOLICITOR AND CLIENT.

Thomas v. Brown, 1 Q. B. D. 714, discussed.] See INSURANCE.

Webb v. Stenton, 11 Q. B. D. 518, not followed.] See ATTACHMENT OF DEBTS.

Withers v. Reynolds, 2 B. & Ad. 882, considered and distinguished.] See CONTRACT, 2.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

COMPANY.

1. *Shareholders — Prospectus — Material change — Change in amount of capital — Contributory — Winding-up.*]—One D. signed his name as subscriber for a certain number of shares at the foot a prospectus of a proposed company, in which it was stated that the capital was to be \$75,000. Without D.'s knowledge or acquiescence, the company, as afterwards incorporated, had a capital of \$150,000. In accordance with the terms of the subscription, and before the incor-

poration of the company, D. paid up half the amount of his shares. There was no allotment of stock to D., no entry of his name in any stock book, and no acting on his part as shareholder. The company being in process of liquidation, it was claimed that D. was a contributory.

Held, that the change made in the capital of the company was a material one, and there being no acquiescence or laches on D's part, he was not liable as a contributory.

Pitchford v. Davis, 5 M. & W. 2. specially referred to. *Stevens v. The London Steel Works Co. Delano's Case*, 75.

2. *Creditors — Locus standi of shareholders—R. S. C. ch. 129.*]—On a petition by certain shareholders of the above company praying for a winding-up order under R. S. C. ch. 129.

Held, that R. S. C. ch. 129, like the Insolvent Act of 1875, which provided for the winding-up of incorporated companies, is intended to be put into operation at the instance of creditors only. *In the matter of the Union Ranch Co. of Canada, Limited*, 307.

3. *R. S. C. ch. 129—Liquidators, appointment of—Shareholders and creditors nominees—Interested liquidators — Compensation.*]—Under secs. 98 and 99 of the Winding-up Act, R. S. C. ch. 129, meetings of shareholders and creditors, respectively, of a bank, were held, at which the shareholders recommended the appointment of C. G. and S. as liquidators, and the creditors C. G. and H. On the application to the Court for the appointment of three liquidators it appeared that resort to the double liability of shareholders would be necessary to satisfy the

claims of creditors under R. S. C. ch. 120, sec. 70.

Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, should be adopted.

Preference should be given to one who is neither a creditor nor a shareholder, the general rule being that it is desirable that liquidators should be disinterested persons.

The intention of sec. 38 of the Winding-up Act is, that the remuneration is not necessarily to be increased because three are to be paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them. *Re The Central Bank of Canada*, 309.

4. *Corporation—Banks and banking—Winding-up Act, R. S. C. ch. 129—Deposit made in bank the day of suspension—Recovery of same back—Fraud.*]—Where a deposit was made in a bank, and it was shewn that at a director's meeting, held the previous day, the necessity of seeking outside assistance or suspending payment had been considered and a resolution passed to suspend payment if such assistance were refused, and that when the bank closed on the day the deposit was made, it did not open again, and notice of suspension of payment was given on the following morning.

Held, that the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, and the liquidators were ordered to pay the same with interest from the date of the deposit.

Quære, whether motion by petition was the proper mode of pro-

cedure in a case like this. *Re The Central Bank of Canada and the Winding-up Act, ch. 129 of R. S. C.*—*Wells and McMurchy's Case*, 611.

5. *Deposit Receipt — Promissory Note—Contributory—Set-off.*]—Y. in making a deposit on a Government contract, gave a marked cheque on the Central Bank, in which he was a shareholder, and which cheque was subsequently cancelled and a deposit receipt issued by the bank substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on December 3, 1887, and on January 20, 1888, Y. having been required by the Government to take up the deposit receipt and replace it with other security, took an assignment of the receipt and notified the bank. On being threatened with a suit on the note, he filed a petition asking for leave to set up the deposit receipt against the note as a set-off.

Held, following *Ings v. President, &c., of the Bank of Prince Edward Island*, 11 S. C. R. 265, that Y. as maker of the note to the bank was a mere debtor and not a contributory, and that although also a shareholder, and so liable as a contributory, he was not a contributory *quoad* the debt which arose out of an independent transaction, and for that reason sec. 73 of R. S. C. ch. 129 did not apply.

Held, also, that the prohibition in the Act against acquiring debts for the purpose of set-off is limited to the case of *contributories*; as to debtors the law of set-off as administered by the Courts is applicable as if the company was a going concern, and following *Re The Moseley &c. Coke Co., Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually

arose not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give security to the satisfaction of the Government and in taking up the deposit receipt and supplying better security Y. was only fulfilling that which he was obliged to do by a prior *bond fide* engagement. *In re The Central Bank of Canada and the Winding-up Act, ch. 129, R. S. C.*—*York's Case*, 625.

COMPENSATION.

Under the Municipal Act, 1883.]
—See MUNICIPAL CORPORATIONS, 8.

CONDITION.

In restraint of alienation.]—See WILL, 1.

In a grant of right of way.]—See WAYS, 1.

In a contract for sale of goods.]—See SALE OF GOODS, 2.

In an insurance policy.]—See INSURANCE.

CONSTITUTIONAL LAW.

Appointment of magistrates by Lieutenant-Governor of Province—Powers of Provincial Legislatures—B. N. A. Act, secs. 91, 92—48 Vic. ch. 17, (O.)]—The Crown has the prerogative right to appoint justices of the peace within the Dominion of Canada and each of its Provinces, but it derogated from that right by assenting to the B.N.A. Act, which conferred upon either the Parliament of Canada or the Legislatures of the Provinces the power to pass laws

providing for the appointment of justices of the peace. Such laws are in relation to the administration of justice, and upon the proper construction of secs. 91 and 92 of the B. N. A. Act are exclusively within the power of the Provincial Legislatures under sec. 92, paragraph 14. Additional weight is given to the construction placed upon these sections, by the Parliament of Canada having from time to time since the B. N. A. Act passed laws recognizing the right assumed by the Provincial Legislatures to pass such laws and the appointments made under them.

An order *nisi* to quash a conviction made by a police magistrate appointed by the Lieutenant-Governor of Ontario under 48 Vic. ch. 17, (O.), on the ground that such statute is *ultra vires*, was, therefore, discharged, with costs. *Regina v. Bush*, 398.

CONTEMPT OF COURT.

Telegrams—Subpœna—Privilege—45 Vic. ch. 93, sec. 18 (D.)—*Telegraph Company, officers of.*]—Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness, and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election.

The witness stated that he had burnt the telegrams in question with others after being subpœnaed, and while the trial was actually going on, upon instructions received by telegraph from the general manager of the telegraph company in whose service he was; that these telegrams, with others, should have been destroyed before, in accordance with a

standing rule of the company, but that he had neglected to do so at the proper time.

Upon the return of an order *nisi* to commit the general manager and the operator for contempt of Court, it was objected that no original subpœna had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in Court; and it was contended that the making away with the messages was not a contempt unless the witness was duly subpœnaed to produce them.

Held, that the question was not whether there had been a proper service of a subpœna; but whether there had been an interference with evidence, which but for such interference would have been before the Court. The documents were in existence at the beginning of the Court; during the trial they were destroyed by the deliberate action of the general manager, whereby the Court was hindered in the prosecution of an investigation of a public nature; and the manager and operator were guilty of a contempt of Court.

Held, also, that no privilege attaches to telegrams in the possession of a telegraph company. 45 Vic. ch. 93, sec. 18, (D.), should not be read as giving an absolute privilege.

Held, lastly, that the operator was the proper person to subpœna to produce the telegrams, as he had the control of them, and the ability to produce them. *Re Dwight and Macklam*, 148.

CONTRACT.

1. *Tender — Evidence of prior agreement — Guarantee — Reference to advertisement.*] — The defendants acting as a committee to

superintend the reception of a large number of persons, and being desirous, in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage, for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for \$1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present, were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B. by whom the tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require the plaintiff to provide for 2,000. The plaintiff then wrote his tender by which he was to get 75 cents a day for every three meal tickets, and the committee were to charge \$1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract.

At the trial, the advertisement and requirements were put in as evidence for the plaintiff, subject to objection.

In an action to recover the amount of the plaintiff's loss from the defendants,

Held, [MACMAHON, J., dissenting] that the tender and acceptance constituted the whole contract; and there was nothing in them to render defendants liable.

Per MACMAHON, J.—The advertisement and requirements must under the circumstances, be incorporated into the tender and acceptance, and so form part thereof so as to render the defendants liable.

McNeely v. McWilliams, 13 A. R. 324, and *Lindley v. Lacey*, 17 O. B. N. S. 578, commented on. *Betts v. Smith et al.*, 413.

2. *Goods deliverable by instalments*—*Payment when no time fixed*—*Refusal to pay for part delivered*—*Refusal to deliver remainder.*]—Plaintiff and defendant entered into the following contract: "To G. M. B. (plaintiff)—Please deliver me at Port Arthur five head good steers on first *City* up, and six steers and heifers on second trip *City* up, and four cows on same trip; also 100 good lambs in lots of 15 or 20, of \$3, each lamb to dress not less than ten pounds per quarter, price of cattle \$3.50 weighed at Port Arthur." Nothing was said as to time of payment. The cattle were all delivered, but the plaintiff refused to complete the contract until the cattle were paid for, which the defendant declined to do.

Held, (reversing ARMOUR, J.), that the price was not payable till the completion of the whole contract, and that the refusal of the defendant to pay for the part delivered, did not justify the plaintiff in refusing to deliver the remainder.

Per FERGUSON, J.—The contract being entire and containing no stipulation regarding the manner or time of payment, the defendant was entitled to refuse to pay for the part

that had been delivered until the the remainder should be delivered, and the refusal of the plaintiff to deliver the remainder was not justified and was a breach of the contract.

Per BOYD, C.—If the contract is entire, the price was not payable until all the deliveries were completed; if it is divisible *quoad* the cattle and the lambs, so as to be in effect two contracts, the failure to pay for the cattle by the one party, would not excuse the other in not forwarding the lambs within the time limited. Where there has been partial delivery, and consumption of that part, and failure to perform the rest of the contract, the seller has the right to sue as upon a *quantum meruit*, and the purchaser has his cross action or counter-claim for damages.

Withers v. Reynolds, 2 B. & Ad. 882, considered and distinguished. *Boyd v. Sullivan*, 492.

3. *Evidence*—*Written contract*—“*Actual first cost*”—*Inadmissibility of evidence to alter meaning of.*—The defendants, carrying on business in manufacturing and upholstering goods, entered into an agreement in writing with plaintiff whereby he was to manufacture all the upholstered goods sold by them at an advance of 11 per cent. upon the actual first cost of goods made and shipped from Toronto, the per centage to pay cost of packing and shipping the goods, and material used as packing, to be charged at actual cost price. Before the agreement was reduced to writing, certain estimates were made as to what the actual first cost would be, taking material and labour as constituting the cost, and the plaintiff in forwarding some of the manufactured goods adopted the estimates.

Held, that the parties by their agreement had precluded themselves from showing anything inconsistent with the natural meaning of the words “actual first cost,” that such meaning must govern; and that the plaintiff was entitled to recover his per centage thereon. *Black v. The Toronto Upholstering Co.*, 642.

To pay in foreign country.—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

For sale of land.—See **SPECIFIC PERFORMANCE**.—**SALE OF GOODS**, 3.

CONTRIBUTORY.

See **COMPANY**.

CONTRIBUTORY NEGLIGENCE.

See **MUNICIPAL CORPORATIONS**, 2.

CONVEYANCE.

By husband to wife.—See **HUSBAND AND WIFE**, 3.

Absence of mesne conveyances in title by possession.—See **LIMITATION OF ACTIONS**, 2.

Voidable.—See **INFANT**.

Procured by threats.—See **UNDUE INFLUENCE**.

CONVICTION.

Mode of drawing.—See **CANADA TEMPERANCE ACT**, 4.

Courts to which to apply to quash.—See **COURTS**.

When evidence of can be given.]—
See CRIMINAL LAW, 1.

*For having liquors near public works.]—*See MALICIOUS ARREST, 2.

See CANADA TEMPERANCE ACT, 7.

CO-OPERATIVE ASSOCIATION.

See PARTNERSHIP, 2.

COPYRIGHT.

Domicile—Proof of copyright—Right to benefit of Statute—Knowledge of existence of copyright—Costs.]
—The plaintiffs, a company incorporated in England for the purpose of securing Canadian copyright, and of acquiring the protection of the Canadian Copyright Act, 1875, moved to restrain the defendants from offering for sale in Canada a collection of songs imported from New York, which contained songs covered by the plaintiff's Canadian copyright.

Held, that neither the facts that the domicile of the plaintiffs was in London, England, nor that the defendants were ignorant of the plaintiffs' right were defences to the plaintiffs' action.

The defendants were ordered to pay the costs of the action, although they had acted innocently, and at once expressed regret, inasmuch as they had contested the plaintiffs' right in Court.

The affidavit of the plaintiffs' manager, setting out their incorporation, and the acquisition of the copyright of the songs in question, and which was in no way controverted, was held, for the purposes of the motion, sufficient evidence of copy-

right. *Anglo-Canadian Music Publishers Association (Limited) v. Winnifrith Bros.*, 164.

CORONER.

See EVIDENCE.

CORPORATIONS.

See COMPANY—MUNICIPAL CORPORATIONS.

COSTS.

See COPYRIGHT. — NEW TRIAL. — SALE OF GOODS, 3.

COUNTY ATTORNEY.

*Right to enter jury room.]—*See EVIDENCE.

COURTS.

Criminal law—Quashing conviction—Forum—O. J. Act—Canada Temperance Act—Police Magistrate—Adjudication outside of territorial jurisdiction—41 Vic. ch. 4, sec. 9, (O.)]—The jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exercisable by them respectively sitting in term; the Courts or Divisions of the High Court of Justice mentioned in subsec. 3 of sec. 3 of the Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective Courts.

or Divisions are analogous to and represent the sittings of the former Courts of Common Law in term, and it is to the sittings of these Courts or Divisions that applications to quash convictions must now be made, having regard to sec. 87 and rule 484 of the O. J. Act, and of R. S. C. ch. 174. sec. 2, sub-sec. 1, and sec. 270. These Courts or Divisions are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. Section 28 of the Act, upon which the supposition that a single Judge sitting in Court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only.

And where a single Judge sitting in Court heard and determined a motion to quash a conviction, an appeal to the Judges of the Queen's Bench Division from his decision, refusing to quash such conviction, was treated as a substantive motion to quash the conviction.

The police magistrate for the county of Brant, whose commission excluded the city of Brantford, convicted the defendant of an offence against the Canada Temperance Act committed at a place in the county outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford.

Held, that the magistrate had no jurisdiction to adjudicate in the city of Brantford, and that what he did was not authorized by 41 Vic. ch. 4, sec. 9 (O.) *Regina v. Beemer*, 266.

COVENANT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

CREDITORS.

Rights of.]—See COMPANY, 2 & 3.

CRIMINAL LAW.

Case reserved—Previous conviction when evidence of can be given—Indictment—Illegal statement of conviction in—Conviction quashed—R. S. C. ch. 174, secs. 139, 207, 230; ch. 164, secs. 6, 19, 23. sub-sec. 2, secs. 44, 84; ch. 167, secs. 13, 21; ch. 168, secs. 24, 25, 45; ch. 181, sec. 25.]— An indictment for an assault occasioning actual bodily harm contained a second count charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which, after a previous conviction for felony, &c., additional punishment might be imposed. The first part of the indictment only, was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner in his defence gave evidence of good character. The Crown gave some general evidence in rebuttal, and then tendered under sec. 26 of ch. 29, 32-33 Vic., a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction.

Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation: evidence of a prior conviction going to the matter of punishment, and not to general character.

Regina v. Rowton, 10 Cox C.C. 25, followed. *Regina v. Triganzie*, 294.

2. *Forgery—Witness interested—Corroboration—R. S. C. ch. 174, sec. 218—Partnership.*]—By sec. 218 of R. S. C. ch. 174. “The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the ‘Act respecting forgery,’ shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution.”

The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co., on the Quebec Bank, which he had altered from \$400 to \$1,400. The evidence in support of the forgery was that of J., who though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability, and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.’s withdrawal.

Held (Rose, J., dissenting), that J. was not a person interested, or supposed to be interested, within the meaning of the Act; and his evidence did not require corroboration. *Regina v. Hagerman*, 598.

See COURTS

CROWN.

Lien of for Customs duties.]—See REVENUE.

CUSTOMS.

See REVENUE.

DAMAGES.

1. *Measure of—Evidence—Injury to land—Injury to business—Prospective value of land.*]—The defendants having built a subway in front of the plaintiffs’ property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, under the circumstances set out in 7 O. R. 270; 8 O. R. 59; 12 A. R. 393; 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an official referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference, the referee ruled (1) that the measure of damages was the difference in value of the property before and after the construction with interest added; (2) that the prospective capabilities or value of the land could not be taken into account except so far as such elements entered into the computation of the then market value, or had regard to what would have been the present value of the property had the subway not been constructed; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling, it was

Held, that the corporation were liable as wrong-doers, who were not protected from the consequences of their tort by any statutory provision, to make good all damages sustained, for which an action would lie for their unauthorized act, such damages being of a two-fold character, involving injury to the plaintiffs’ land and to their business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads.

Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value; such evidence to be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and the potential value of the property. *West et al. v. Parkdale et al.*, 319.

2. *Railways—Contract—Failure to run trains to points contracted for—Remoteness of damages—Loss to city on assessment—Measure of damages.*]—Where a railway company in breach of a contract entered into by them to run trains from the eastern part of the city of St. T. to the western part, ceased to run such trains.

Held, on a reference as to damages, that though the actual depreciation of property in the western part of the city resulting therefrom was a matter pertaining to the property owners, and not to the city, yet the lessened taxation resulting from such depreciation was not too remote a fact for consideration on the reference, and such a loss in taxation which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs were entitled. Stated broadly the enquiry was, how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued.

Constat, that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station or the actual depreciation

in the value of the land individually owned in that neighborhood could not be reckoned as constituents *per se* of the damages suffered by the corporation.

Held, also, that if the railway company admitted that they were never again going to run trains to the western end of the city, the damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment. *Corporation of the City of St. Thomas v. The Credit Valley R. W. Co.*, 673.

For detention of dower.] — See DOWER.

Proximate cause of.]—See WATERS AND WATERCOURSES.

Assessed up to judgment.]—See MUNICIPAL CORPORATIONS, 8. — LANDLORD AND TENANT, 6.

DEED.

Procured by threats.]—See UNDUE INFLUENCE.

DEMAND.

Of possession.]—See LANDLORD AND TENANT, 2.

DEMURRER.

Necessary averments in.] — See MECHANICS' LIEN, 1.

DESCRIPTION.

In deed by reference to plan.]— See SURVEY.

DEVISE.

See WILL.

DOMICILE.

Of drawer and acceptor of bill of exchange.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES. 1.

Of plaintiff in copyright action.]—See COPYRIGHT.

DOWER.

Damages for detention—Alienation by husband.]—Held, that a widow cannot recover damages for detention of dower when her husband did not die seized even though she made demand for dower. *Morgan v. Morgan*, 194.

DRAINS.

See MUNICIPAL CORPORATIONS, 6, 12. WATERS AND WATER COURSES.

EASEMENTS.

See WAYS, 2.

ENGINEER.

Duty of Township Engineer.]—See WATERS AND WATERCOURSES.—MUNICIPAL CORPORATIONS, 10.

EQUITY OF REDEMPTION.

See MORTGAGE, 1, 3, & 4.

ESTATE TAIL.

See WILL, 3.

ESTOPPEL.

Former action of ejectment—Judgment for default of defence.]—Action for breach of agreement made between plaintiff as mortgagor and defendants as mortgagees, whereby in consideration of the plaintiff having given defendants a chattel mortgage on certain property, defendants agreed to extend the time for payment of the mortgage, &c., one year from 1st of April, 1882. The defence was, that on 17th June, 1882, the now defendants brought ejectment against the now plaintiff, setting up that by such mortgage on default of payment of the mortgage moneys, the now defendants should be entitled to take possession of said lands; alleging default, and by reason thereof the now defendants claimed possession: that the now plaintiff did not plead any defence to the action and for default of any defence on 30th September, judgment for possession was recovered.

Held, that the judgment so recovered estopped the now plaintiff from maintaining the present action. *Cochrane v. The Hamilton Provident Loan Society*, 128.

See INSURANCE. PARTNERSHIP, PRINCIPAL AND SURETY.

EVIDENCE.

Coroner—Evidence—Discrediting witness at inquest—R. S. C. ch. 174, sec. 234—County Attorney—Right to enter jury room.]—At a coroner's inquest evidence is properly receivable under R. S. C. ch. 174 sec. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment

the improper reception of evidence is no ground for a *certiorari* to bring up the coroner's inquisition. *Regina v. Ingham*, 5 B. & S. at p. 260, specially referred to.

It is not improper for the county attorney acting for the prosecution to enter the jury room, with the consent of the coroner, after the jury have reached a conclusion, where the object of the county attorney is to advise the jury as to the proper language to be employed in order to draw their verdict after it has been arrived at. *Regina v. Sanderson*, 106.

Inadmissibility of to alter meaning of written contract.]—See CONTRACT, 3.

Of previous conviction.] — See CRIMINAL LAW, 1.

Of interested witness.]— See CRIMINAL LAW, 2.

When parol evidence admissible to rebut presumption that purchaser to pay off existing mortgage.]— See MORTGAGE, 1.

Of negligence.]—See MUNICIPAL CORPORATIONS, 9.

Weight of.]—See NEW TRIAL.

EXECUTION.

Receiver appointed by way of equitable execution.]—See RECEIVER.

EXECUTORS AND ADMINISTRATORS.

See PROBATE.

EXPROPRIATION.

See RAILWAYS AND RAILWAY COMPANIES, 3.

FACTOR'S ACT.

See SALE OF GOODS.

FENCES.

Duty to maintain on right of way.]—See WAYS.

FIRE.

See INSURANCE.

FORECLOSURE.

Of lands out of the jurisdiction of the Courts.]—See MORTGAGE, 2.

FORGERY.

See CRIMINAL LAW, 2.

FRAUD.

See FRAUDULENT PREFERENCE.—COMPANY, 4.

FRAUDS, STATUTE OF.

See SPECIFIC PERFORMANCE.

FRAUDULENT PREFERENCE.

Chattel mortgage — Security on future-acquired property to secure future advances in goods—Simultaneous mortgage on same property to

secure past indebtedness—*R. S. O. ch. 119, sec. 6—48 Vict. ch. 26, sec. 2 (O.)*—A mortgage by an insolvent person on future-acquired chattels to secure the repayment of the price of such chattels to the vendor thereof is binding, notwithstanding 48 Vic. ch. 26, sec. 2 (O.)

On April 26th, 1886, M. A. V., in pursuance of a written agreement of the same date, gave a mortgage to the plaintiffs on her furniture and stock in trade, present and future, to secure advances of goods to be made by the plaintiffs within seven months, to the extent of \$1,000 in value; and at the same time she executed a mortgage on the same goods to secure a past indebtedness to the plaintiffs. The advances were made, pursuant to the mortgage, to the extent of about \$600. M. A. V. was insolvent at the time, but not to the knowledge of the plaintiffs, and the transaction was an honest one throughout. Over a year after the goods were seized in execution by the defendant. At that time the past indebtedness secured by the mortgage relating thereto had all been paid off. It did not appear that the payments were made out of the new goods.

Held by the Divisional Court, upon the evidence, that there were two agreements—one to secure a past indebtedness, and the other to secure the future advances; and that the mortgage to secure future advances was a valid security within sec. 6 of R. S. O. ch. 119.

Held, also, that the transaction had not the effect of giving a preference under 48 Vic. ch. 26, sec. 2.

It was not void under 48 Vic. ch. 26, sec. 2, for substantially it was given by way of security for a present actual *bonâ fide* sale and de-

livery of goods, within the exception to that section; and it was not a preference of the plaintiffs over other creditors, as but for it the plaintiffs would never have become creditors at all; and there was no question, under sec. 3 (1), as to the goods bearing a fair and relative value to the consideration therefor, inasmuch as it was not an absolute conveyance or transfer, but a mortgage, and would attach only to the exact extent to which value was given therefor, by the delivery of goods.

Per PROUDFOOT, J.—The “advances” referred to in R. S. O. ch. 119, sec. 6, need not be pecuniary.

Coyne v. Lee, 14 A. R. 503, cited and followed. *Goulding v. Deeming*, 201.

See PARTNERSHIP, 3.

GARNISHMENT.

Of undistributed share under a will.—*See* ATTACHMENT OF DEBTS.

GOODWILL.

See PARTNERSHIP, 1.

HUSBAND AND WIFE.

1. *Marriage—Banns—License—Evidence—Bastardizing issue—26 Geo. II., ch. 33—C. S. U. C. ch. 102, sec. 103—37 Vict. ch. 6, sec. 1 (O.)—Legal presumption in favour of marriage.*—In ejectment it appeared that M. one of the defendants, was married to N., 7th February, 1866, on one calling of banns, a dispensation having been procured from the Roman Catholic

Archbishop for the other two calls, both parties belonging to that faith. The husband had immediate and continued possession of the land in question under deed to him. Of this marriage was born, 20th February, 1867, an only daughter. N. died 3rd May, 1868, and his widow M., on 11th October, 1870, intermarried with the defendant K., and they continued in uninterrupted possession until the issue of the writ herein. On 11th January, 1886, the daughter of M. & N. intermarried with the plaintiff, to whom was born, in wedlock, 3rd July, 1886, though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff and his infant daughter against M. and her husband, the defendant K., they claimed title by possession and denied the validity of the marriage between M. & N., on the ground of the non-publication of banns, *Held* (1) That the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II., ch. 33, was in force in Canada as to publication of banns. (3) That 37 Vic. ch. 6, sec. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favour of marriage.

Per ARMOUR, C. J.—Full effect is given to the proviso of sec. 1 of 37 Vic. ch. 6 (O.) by reading it as limited to preserving the invalidity of a marriage illegally solemnized, when either of the parties to such illegal marriage, has since, during the life of the other, contracted marriage according to law. *O'Connor v. Kennedy*, 20.

2. *Wife living apart—Husband in possession of wife's land—Recovery of possession by wife—Claim for use and occupation.*]—Under the O. J. Act, sec. 25, sub-sec. 2, a Judge sitting elsewhere than in a Divisional Court, is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court.

On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings," was reserved for the opinion of the Judges of this Court. On the case coming before the Divisional Court, it was held that the special case as such could not be entertained; but the application was directed to be turned into a motion for judgment under Rule 323, or on the pleadings and admissions under Rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning land in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for \$2,000, and expended it in improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of writ.

Held, following *Donnelly v. Donnelly*, 9 O. R. 673, the plaintiff was entitled to possession; but could only recover for the use and occupation since the service of the writ.

Held, also, that the defendant

could not claim for the moneys expended by him on the land. *Till v. Till*, 133.

3. *Conveyance directly from one to the other.*]—A conveyance direct from husband to wife, is not necessarily void to all intents and purposes; in equity it may be valid.

Therefore, in this action, in which the plaintiff claimed possession of the lands against J. M., who, in 1884, had conveyed to S. M., his wife, for an expressed consideration of \$100, S. M. having, in 1887, conveyed to the plaintiff, and in which J. M. now contended his deed to S. M. was void, and the Judge at the trial on that ground nonsuited the plaintiff at the opening of the case.

Held, that there must be a new trial, especially as it was stated by counsel that the legal estate was outstanding in a mortgagee at the time of the conveyance from J. M. to S. M. *Jones v. McGrath*, 189.

ICE.

On sidewalks.]—See MUNICIPAL CORPORATIONS, 2.

INFANT.

Married woman—Voidable conveyance—Relief—Ratification.] The effect of legislation now embodied in R. S. O. ch. 127, sec. 3, has been to give to the conveyance of an infant *feme covert* the same characteristics as are by law attributed to the conveyances of male infants, i. e., if such deeds are of benefit to the infant or operate to pass an estate or interest they are voidable not void.

When a little more than two months after coming of age, a married

woman sought to set aside conveyances for value made by her, while an infant *feme covert*, to the defendants, who were ignorant of her disability, and under which defendants had taken possession, it was

Held (reversing the judgment of Rose, J., at the trial), that she was entitled to such relief; but before the same could be granted, she must make complete restoration to the defendants of the specific or an equivalent value of that which she had received from them during her infancy. Mere quiescence for about two and a half months after attaining majority was considered insufficient to operate as a ratification of the conveyances. *Whalls v. Learn et al.*, 481.

INSURANCE.

Fire—Conditions of policy—Limitation of actions—Waiver—Estoppel by conduct—Special case stated—Vacating—Amendment.] The plaintiff sued upon an insurance policy for a loss occasioned by a fire, which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced till the 11th July, 1877. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to the 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did so procure and furnish, additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as required by one of the conditions in variation of the statutory conditions, which provided

that the loss should not be payable until sixty days after the completion of the claim.

Held, per ARMOUR, C. J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars and thereby putting him to loss of time, trouble and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action.

Per STREET, J., that in the absence of any agreement not to insist upon the condition, there could be no waiver unless the defendants had so acted as to estop themselves from taking advantage of the condition; there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and the defendants were, therefore entitled to the benefit of it.

Cornish v. Abington, 4 H. & N. 548, and *Thomas v. Brown*, 1 Q. B. D. 714, discussed.

Held, also, per ARMOUR, C. J., that, except by consent, affidavits cannot be received to alter or modify a special case stated by consent; the only relief open to a party complaining that a case has been misstated, is to apply to amend or vacate it; and *quære*, whether it could be amended after judgment.

The two Judges who composed the Divisional Court at the hearing of this case disagreeing, a motion to set aside the judgment of the trial Judge in favour of the plaintiff was dismissed *Cousineau v. The City of London Fire Insurance Co.*, 329.

INTEREST.

On mortgage after default.—See MORTGAGE, 3.

Endorsement of payment of on back of promissory note.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

JUSTICE OF THE PEACE.

Assault—Want of evidence—Interested Justice.—The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting justice, where the only evidence was, that the defendant had, in company with one Spragge, gone to the complainant's house, at the hour of about 10 o'clock p.m., and Spragge had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning.

Held, that there was no evidence of an assault, and the conviction must be quashed.

Held, also, that it was improper for the justice to sit and try the case, the complainant being his daughter; and that this was a good ground for quashing the conviction.—*Regina v. Langford*, 52.

See CANADA TEMPERANCE ACT, 3.
—MALICIOUS ARREST, 2.

LANDLORD AND TENANT.

1. *Bankruptcy and insolvency—Assignment under 48 Vic. ch. 26 (O.)—Distress for rent—Goods not in custodia legis.*—The tenant of certain freehold premises executed an assignment under 48 Vic. ch. 26 (O.), and afterwards, but before possession of the tenant's property had been taken by the assignee, or

such property removed from the demised premises, the landlord distrained for arrears of rent past due before the making of the assignment.

Held, that the landlord's right of distress was not affected by the assignment.

Held, also, that goods so assigned were not to be therefore deemed in *custodia legis*. *Eacrett v. Kent*, 9.

2. *Forfeiture of term by assignment—Overholding Tenant's Act—Notice.*]—S. and his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at the time when two quarter's rent were overdue and in arrear, made such an assignment to C., who thereupon took possession of the premises, and shortly afterwards paid D. the two quarter's arrears of rent. A few weeks later D. served on S. and his partners a demand of possession and notice of application to the Judge under the Overholding Tenant's Act, which S. handed to C., and C. appeared before the County Judge on the hearing of the application, and had himself added as a party to the proceedings.

On motion by C. in the High Court to set aside the proceedings,

Held, that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of the second section of the Overholding Tenant's Act, and that C. having intervened in the proceedings could not object that no demand had been served on him.

Held, also, that the receipt after the forfeiture of the rent which had become due before the forfeiture, did not operate as any waiver thereof,

and that a sufficient demand in writing of possession had been made upon C. by the landlord. *Dobson v. Sootheran et al.*, 15.

3. *Waste—Stones gathered by tenant—Property in.*]—A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them.

Saunders v. Breakie, 5 O. R. 603, commented on. *Lewis v. Godson*, 252.

4. *Lease—Covenant by lessee to pay taxes—Construction of—Purchase at tax sale by lessee during tenancy.*]—K. and others, on 1st October, 1880, leased to C. and another, two parcels of land for four years, the lessees covenanting to pay all taxes, rates, &c., "which now are, or which during the continuance of the term hereby demised, shall at any time be rated," &c. In March, 1881, the lessors mortgaged one of said parcels to H. In December, 1883, part of the mortgaged land was sold to C. for the arrears of taxes to 31st December, 1882, and a conveyance was subsequently made to him by the warden and treasurer. It appeared that the land was sold for the taxes due for the years 1880 and 1882, with interest and costs.

In an action brought by the mortgagee H. to set aside the tax deed as a cloud on the title, or to have the tax purchaser declared a trustee for him.

Held, that the tax purchaser could not hold the title so acquired against his lessors and the plaintiff, the lessees being bound under their covenant to pay the taxes for which the land was sold.

McNaughton v. Wigg, 35 U. C. R. 111, distinguished. *Hayden v. Castle*, 257.

5. *Mortgage — Re-demise clause, construction of—Creating tenancy—8 Anne ch. 14, sec. 1.*—In a mortgage of lands under the Short Forms' Act there were the usual covenants and provisoes, except the provisoes that the mortgagees might distrain for arrears of interest, and that until default the mortgagor should have quiet possession, which were omitted; and there was a re-demise clause setting out that the mortgagees leased the mortgaged lands to the mortgagor from the date of the mortgage until the date provided in it for the last payment, the mortgagor paying in every year during the term, on each of the days appointed for payment by the redemption clause, such rent or sum as should equal the amount payable on such days according to such clause, such payments to be taken to be in satisfaction of the moneys payable under such clause. There was no other provision in the mortgage which could be taken as creating a tenancy, nor was there any attornment clause.

Held, that the re-demise clause was void as a lease or as creating a tenancy, because it was for the whole term of the mortgagees' interest; and, also, because, being for a longer term than three years, it was not by deed, the mortgage not having been executed by the mortgagees.

As the mortgagor did not enter under the void lease, being already in possession, he could not be regarded as a tenant at will whose tenancy had been changed into one from year to year by virtue of payments made according to the intended lease, but must be considered as a mortgagor in possession.

Properly construed, the re-demise clause was merely a provision that that mortgagor should remain in possession until default.

Held, also, upon the evidence, that the relationship of landlord and tenant was never intended to be created in reality; and, not having been technically created, there was no tenancy in law or in fact, at a rent reserved, such as would, under 8 Anne ch. 14, sec. 1, entitle the mortgagees, as to goods seized upon the lands in question, to a preference over other creditors of the mortgagor. *Ontario Loan and Debenture Co. v. Hobbs et al.*, 440.

6. *Postponing lease to mortgage—Effect of—Priority over subsequent mortgage—Covenants for quiet enjoyment; and to renew—Damages—Lien over subsequent mortgages.*—A., the owner of certain lands, executed a lease under the Short Forms Act to the plaintiff and two others for twenty years, which was registered. The lessees covenanted to plant the premises with fruit trees, and keep the premises during the term as an orchard. The lessor covenanted for quiet enjoyment; and that if during the term the premises were for sale, the lessees should have the refusal, and if the lessees could not on the expiration of the term get a renewal, they were to be allowed a fair valuation for the orchard and improvements. The lessees went into possession and planted the fruit trees. Afterwards to enable the lessor to procure a loan from an investment company, the lessees entered into an agreement, which was registered, to postpone their lease to a mortgage to the company, so that the mortgage would be a first and prior incumbrance on said lands, and in default

of the payment of the mortgage money, the lease was to be forfeited and void; and the company might, without any notice, etc., enter and hold said lands freed from the lease, etc. The lessor then executed two other mortgages to different mortgagees on the property, which were past due at the commencement of this action. The lessor subsequently and during the continuance of the lease made default in payment of the mortgage to the company, who sold the land, and after satisfying their mortgage, paid the balance of the purchase money into court.

Held, by ROBERTSON, J., and affirmed by the Divisional Court (GALT, C. J., dissenting), that by the agreement postponing the lease to the company's mortgage the lessees were placed in no worse position than if the mortgage had been made prior thereto, so that the lessees merely held subject to the mortgage, and the subsequent mortgagees to the lease: and that the lessees were entitled to damages for breach of the covenant for quiet enjoyment.

Per ROBERTSON, J., also. The lessees were entitled to damages for breach of the covenant for renewal; and *semble* such covenant did not run with the land.

Held, also, by the Divisional Court, in this reversing the judgment of ROBERTSON, J. (Galt, C. J., dissenting), that the plaintiff having an estate in the land had a claim on the fund in Court prior to the subsequent mortgagees, and was entitled to a declaration for payment out of the value of her interest in the unexpired term, namely, one-third of the net annual value or profit which would have been derived therefrom had the lessees been permitted to remain on the land during the term,

and that such value must be computed with reference to the agreement that on non-renewal the lessees were to get the value of the trees and improvements; and in such view it was not necessary to consider the question of the breach of the covenant to renew. *Anderson v. Stevenson*, 563.

LEASE.

See LANDLORD AND TENANT. LIMITATION OF ACTIONS, 3. WILL, 4.

LESSOR AND LESSEE.

See LANDLORD AND TENANT.

LICENSE.

See TAVERNS AND SHOPS. MUNICIPAL CORPORATIONS., 1.

LIMITATION OF ACTIONS.

1. *R. S. O. ch. 108, secs. 5, 44—Coverture—Possession—Tenancy by the curtesy.*—In an action for the recovery of land it appeared that the land was granted by the Crown in 1838 to plaintiffs' mother, who was then a married woman, and who had by her husband issue born alive and capable of inheriting the estate. The patentee died in 1856; her husband lived till 1883. Neither of them, nor any of their heirs-at-law, were ever in possession. Defendant claimed by possession, which began in 1853, and had continued thenceforward without interruption.

Held, following *Doe Corbyn v. Bramston*, 3 Ad. & El. 63, that the

patentee having been dispossessed within the terms of the Statute, R. S. O. ch. 108, sec. 5. in 1853, more than twenty years before this suit was commenced, the action was barred by sec. 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of plaintiffs' father. *Hicks v. Williams*, 228.

2. *Title by possession—Successive occupants—Absence of mesne conveyances.*—The fact of their being no conveyances between successive occupants of lands does not prevent a possessory title being acquired by virtue of their combined periods of possession, provided the possession has been of a continuous character against the true owner, and provided that the successive occupants claimed under each other in some sufficient way as in this case by virtue of a sale for value.

The Statute of Limitations speaks of possession without reference to conveyances. *Simmons v. Shipman*, 301.

3. *Entry by owner—Life lease to one of several in possession—Effect of.*—In 1860, D. M., the then owner of certain lands, conveyed to A., who in 1861 conveyed to N., through whom plaintiff claimed. D. M. continued in possession, and, at his request, his sister M. B. came and resided with him, and took charge of the house and their sister S. M., who was subject to fits, which to some degree affected her mind. In 1862, D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868, defendant, the sister's nephew, came to reside with them, M. B. giving him charge of the place, upon which he subsequently erected buildings. In 1875 N. went upon the land in assertion

of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favor of M. B. and S. M., which was accepted by S. M., who executed the lease, but not by M. B., who refused to so: S. M., M. B., and defendant, still continuing to reside on the premises. M. B. died in 1879, and S. M. in 1886. The defendant continued to reside thereon. In 1887 the plaintiff brought ejectment against defendant, who claimed a title by possession.

Held, that N. having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and his successors in title; and therefore, plaintiff was entitled to recover. *Arnold v. Cummer*, 382.

MAGISTRATE.

Jurisdiction of a Police Magistrate who held a commission both for a county and a town.—See CANADA TEMPERANCE ACT, 1.

More than one Police Magistrate in a county.—See CANADA TEMPERANCE ACT, 2.

Jurisdiction of Stipendiary Magistrate.—See CANADA TEMPERANCE ACT, 5.

Appointment by Lieutenant-Governor.—See CONSTITUTIONAL LAW.

Interest of.—See JUSTICE OF THE PEACE.

MAINTENANCE.

Covering medical attendance and funeral expenses.—See WILL, 6.

MALICIOUS ARREST.

1. *Reasonable and probable cause—Evidence of—Non-statement of full facts to solicitor and police magistrate.*—The plaintiff at Brantford having corresponded with the defendant at Hamilton, as to purchasing ice, defendant on 7th September, notified plaintiff by telegram that the ice would not be sent unless plaintiff telegraphed money to cover freight and ice, to which plaintiff answered that the money was paid to the express company, and to send a full car, which was done. No money had, however, been paid to the express company. On 9th September, defendant telegraphed plaintiff asking him what he meant. The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to plaintiff on the following day. The plaintiff had, on 9th September, deposited \$30 with a bank in Brantford to defendant's credit, supposing it would be transmitted to defendant, which was not done. On 1st October, defendant wrote plaintiff that unless he sent the full amount of account defendant would have to take criminal proceedings. On 7th October, the defendant not having received a reply from plaintiff, consulted his solicitor, who, defendant said, advised that plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, laid information before the police magistrate, who issued a warrant under which plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank, was proved to be true, whereupon the magistrate

stated that there was no ground for the arrest, and dismissed the case. In an action for malicious arrest, the jury found that the defendant believed the plaintiff had not deposited the money with the express company or with the bank, but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether the defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate.

Held, [reversing the judgment of CAMERON, C. J., at the trial,] under the circumstances, there was a want of reasonable and probable cause; and the plaintiff was entitled to recover. *McGill v. Walton*, 389.

2. *Justice of the peace—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of "not guilty by statute"—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production at trial—Admissibility in Divisional Court.*—The plaintiff having been arrested, convicted and imprisoned for having liquors for sale near public works, writs of *habeas corpus* and *certiorari* were issued, and on the return thereof he was discharged. Under a writ of *certiorari* directed to defendants, the convicting magistrates, the conviction, which was not under seal, was returned by defendants' solicitor, to whom all the papers had been delivered by defendants, and who in his affidavit accompanying the return swore that the conviction

returned was the one made by defendants.

Held, by ARMOUR, J., at the trial, in an action against the magistrates, that not being under seal it was not necessary that the conviction should have been quashed before action brought. *Haacke v. Adamson*, 14 C. P. 201, and *McDonald v. Stuckey*, 31 U. C. R. 577, followed.

Held, also, by the Divisional Court, that the return being made to a writ of *certiorari* directed to the defendants, and not referring to the *certiorari* directed to the jailer under the *habeas corpus*, and in face of the solicitor's affidavit, a properly sealed conviction, which however was not produced at the trial could not be received.

The notice of action stated that the cause of action arose "in the month of May last, 1884, at said village of M. and in the town of P."; and was served at defendant C.'s head office on his agent there, also at his place of residence, and on his solicitors. The statement of claim alleged the service of such notice. The only defence was "not guilty by statute R. S. O. ch. 73, sec. 11," the section requiring notice being section 10.

Held, by ARMOUR, J., and the Divisional Court, that the statement of time and place as well as the service were sufficient.

Oliphant v. Leslie, 24 U. C. R. 398, followed.

Held, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules, the particular section of the statute relied on should have been pleaded.

Held, also, following *Legacy v. Pitcher*, 10 O. R. 620, that in such an action the venue need not be laid where the offence was committed.

From the village of M., where the arrest and conviction took place and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction, over 50 miles distant, the company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation was issued under R. S. O. ch. 32, proclaiming this a public road; but subsequently the Dominion Government, by proclamation, issued under R. S. C. ch. 151, proclaimed the ten miles on each side of the supply road to be in the vicinity of a public work.

Held, by ARMOUR, J., and the Divisional Court, MACMAHON, J., doubting, that the village of M. was not within three miles of a public work under R. S. O. ch. 32.

Per GALT, C. J.—The place did not come within either Act, no proclamation having been issued at the time.

On application to the Divisional Court for leave to put in evidence the written order for the destruction of the liquor, which was not produced at the trial.

Per GALT, C. J.—The magistrate had no power to make the order, the authority to do so being based on R. S. O. ch. 32, which was not made applicable, and therefore the order was not admissible.

Per ROSE and MACMAHON, JJ.—The order for the destruction of the liquor, was not dependent on the conviction of the plaintiff, and came within R. S. O. ch. 73, and the destruction was an act under an order thereunder, which order must be quashed to avoid the protection afforded by sec. 4; but

Per ROSE, J., it should not now be received in evidence.

Per MACMAHON, J.—It should be received; and a new trial granted

on this part of the case. *Bond v. Connec*, 716.

MARRIAGE.

Legal presumption in favour of.]—See HUSBAND AND WIFE, 1.

Publication of banns.]—See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

1. *Railways—Accident—Negligence*—“*Workmen’s compensation for Injuries Act—49 Vic. ch. 28, sec. 3, sub-sec. 5 (O.)*”—B., the plaintiff’s son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler, from which death resulted. The accident was apparently caused by the sudden influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he was also responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants’ officials it appeared that B. had charge of the water at the time of the accident. In an action against defendants for damages under “*The Workmen’s Compensation for Injuries Act*,” 49 Vic. ch. 28, sec. 3, sub-sec. 5 (O.)

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Held, that the defendants were not liable. *Brunell v. The Canadian Pacific Railway Company*, 375.

2. *Dismissal—Speculating in stock and grain exchanges through “bucket shops”*—*Judgment where jury disagree—O.J.A. Rule 321.*]—The defendants carried on the business of a commercial agency, of which the plaintiff was general manager, having oversight over the employees, and command of a large amount of money passing through his hands. By the terms of his engagement plaintiff was to be paid a salary of \$5,000, and was to devote his whole time, influence, and talents to the successful prosecution of the business, the failure of either party to keep the agreement rendering it void. The plaintiff having engaged in speculating in margins in the stock and grain exchange, through brokers and “bucket shops,” had sunk all his private means, and had become indebted to a large extent beyond his ability to pay. It appeared also that he had engaged in some of such speculation with various merchants, whose ratings he had not altered, although in his judgment transactions of that nature, materially affected the credit of those engaging in them. Having been requested by defendants to give up speculating, he refused to do so, stating that if his so doing was a condition of his remaining he would dissolve the connection—whereupon he was dismissed.

Held, that his dismissal was justifiable. *Priestman v. Bradstreet*, 558.

MECHANICS’ LIEN.

1. *Registered lien—Necessary statements therein—Demurrer—R. S. O. ch. 120, secs. 4, 20.*]—Where in an

action to enforce a mechanics' lien the plaintiff purported to set out on his statement of claim the registered lien verbatim, and the same as so set out, did not show that the work was done and the material furnished within thirty days from the registration of the lien, nor the amount due.

Held, on demurrer, bad, but leave given to amend. *Roberts v. McDonald et al.*, 80.

2. *Mortgage—Prior or subsequent incumbrancer.*—The plaintiff worked on a barn belonging to the defendant up to August 9th, 1887, and did some further work on October 25th, following. The defendant mortgaged his land to A. S. by mortgage dated October 21st., and registered October 24th. Plaintiff registered his lien October 25th, and having brought his action against defendant only, obtained the usual judgment with a reference to the Master, who made A. S. a party to the suit in his office and A. S. thereupon petitioned to have the Master's order set aside.

Held, following *McVean v. Tiffin*, 13 A. R. 1, that the mortgage was not a subsequent but a prior mortgage as regarded the plaintiff's lien, and that A. S. should not have been added as a party. *Reinhart v. Shutt*, 325.

3. *Equitable interest in the land—Fraudulent scheme to evade lien—Notice—Registry Act—Innocent purchaser.*—The law that a lien which arises by virtue of being employed and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance, must be restricted to an innocent purchaser who is entitled to the protection of the Registry Act, i. e., one who has not actual notice of the

prior lien before he pays his money and registers his deed. *Wanty v. Robins et al.*, 474.

MORTGAGE.

1. *Rights and liabilities of purchaser of equity of redemption—Sale subject to mortgage—Liability to indemnify—Parol evidence.*—Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser.

Parol evidence, however, could not have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity. *Corby v. Gray*, 1.

2. *Lands out of jurisdiction—Sale.*—Although in an action on a mortgage of lands situate out of the Province judgment of foreclosure will be granted against a defendant residing therein, such judgment merely operating in *personam* as an extinguishment of a personal right, yet the Court will not extend the doctrine by ordering a sale of land over which it has not territorial jurisdiction, not being able

to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale. *Strange v. Radford*, 145.

3. *Mortgagor and mortgagee—Redemption—Six months notice or interest after default—Interest post diem—Tender—Evidence.*—T. borrowed money from the defendants and gave a mortgage over certain lands as security, with other securities as collateral, giving a second mortgage over the same lands to the plaintiff. Both mortgages being in default, the defendants agreed in writing with the plaintiff, who began foreclosure proceedings, that if he obtained a final order subject to their claim, they would accept from him a new mortgage over the same property for \$15,000, payable in five years from the date of the order, with interest at 8 per cent., and that he was "to have the privilege of paying any part of principal at any time." Upon payment as aforesaid the defendants were to assign to the plaintiff their mortgage from T. and all collaterals. The plaintiff obtained a final order and gave the defendants a mortgage dated 8th January, 1881, for the above amount, payable at the expiration of five years with interest at 8 per cent. half yearly, "until fully paid and satisfied." The mortgage provided, after payment, for assignment to the plaintiff of the original securities, and had a clause that "the mortgagor may at any time pay off the whole or any part of the said \$15,000, before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the

expiration of five years the plaintiff paid interest at the specified rate, until the 1st January, 1887, and on the 22nd March following tendered the defendants the principal and interest at that rate up to that day, and demanded an assignment of the original mortgage and securities. The defendants refused to accept, claiming that they were entitled to six months notice of the mortgagor's intention to pay, or to six months' interest in advance.

Held, ARMOUR, C. J., dissenting. 1st. That the rule followed by Courts of Equity in England that a mortgagor must, after default by him in payment of the principal money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, unless the mortgagee has demanded or taken any steps to compel payment, has the force of law in Ontario.

2. That there were no circumstances in the present case to do away with its effect, the proviso for payment of the principal being limited to the five years within which the plaintiff had covenanted to pay the same.

3. That after the expiration of five years from the date of the mortgage there was no contract in force for the payment of interest, and the defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld, and during the currency of the six months' notice.

4. That in this case the defendants were entitled to the six months' notice and the tender on 22nd March, 1887, was insufficient, and as no evidence was given by the defendants as to the rate of interest after default, and

evidence offered by the plaintiff on the point was refused at the trial, the legal rate of 6 per cent. should be taken at the measure of damages. *Archbold v. The Building and Loan Association*, 237.

4. *Acquirement of equity of redemption by mortgagee—Release of mortgagor—Intention—Evidence of.*—The defendant executed a mortgage on certain land to the plaintiffs, dated November 5th, 1881, to secure \$2,200 and interest, and on May 8th, 1882, conveyed the land to L. subject to the mortgage. On May 12th, 1883, L. conveyed to the plaintiffs. Afterwards the plaintiffs entered into an agreement with C. for the sale of the land to him for a sum less than the amount due them, which was followed by a conveyance to him. Subsequently the plaintiffs brought an action against defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L. when they took the conveyance from her, was that defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them.

Held, that whether there was such an agreement or not, it would not be binding on defendant, for he having sold to L. subject to the mortgage, it was L.'s duty to indemnify him against it, and plaintiffs took with knowledge of this and never communicated with him; and moreover by their subsequent sale to C. they put it out of the defendant's power to redeem.

North of Scotland Mortgage Co. v. Udell, 46 U. C. R. 511, and *North of Scotland Mortgage Co. v. German*, 31 C. P. 349, commented on. *The British and Canadian Loan and Investment Co. v. Williams*, 366.

With re-demise clause.—See LANDLORD AND TENANT, 5.

Priority of over subsequent mortgage.—See LANDLORD AND TENANT, 6.

Priority of over Mechanics' lien.—See MECHANICS' LIEN, 2.

MUNICIPAL CORPORATIONS.

1. *Municipal law—Intoxicating liquors—R. S. O. ch. 181, sec. 17—By-law—Power to limit tavern licenses.*—*Held*, (1.) That the council of the corporation of the city of Toronto has the power under R. S. O. ch. 181, sec. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law [39 Vic. ch. 26 (O.)] granting limiting powers to the board of license commissioners.

2. That though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the council of the city, and could have had no operation elsewhere than in the city, shewed that it must, by reasonable intendment, be held operative there.

3. That the by-law was not unreasonable or oppressive, or in restraint of trade, having been passed under a power expressly given by the Legislature to the city to pass the same. *Re Boylan and the City of Toronto*, 13.

2. *Ice on sidewalk—Negligence—Knowledge—Contributory negligence.*—The plaintiff, while walking home at night, as he was accus-

tomed to, along the sidewalk provided by the defendants for foot passengers, and which the defendants were bound by statute to keep in proper repair, but along the centre of which a ridge of ice had accumulated, and been allowed by them to the knowledge of the plaintiff to remain in that condition for a couple of months, slipped across the ridge and fell, injuring himself. While stating that he was walking carefully, he admitted that he was aware that it was a dangerous place, and might have been avoided, either by his taking to the travelled road, or by going home another, but longer way. Numbers of people were in the habit of using it daily without accident. The Judge at the trial declined to withdraw the case from the jury.

Held, that the plaintiff, having the right to use the sidewalk, it was a question for the jury whether under the circumstances of the case he was exercising such care as a prudent person would reasonably exercise in using it, knowing its condition.

Knowledge is not *per se* contributory negligence. *Gordon v. The City of Belleville*, 26.

3. *Municipal powers—Submission to electors of matters over which, without assent of electors, municipal council has jurisdiction—Injunction to restrain such submission.*—The defendants' council passed through two readings by-laws for the limitation of the number of tavern and shop licenses, under R. S. O. ch. 181, secs. 17 and 24. Before the third reading the council passed a resolution authorizing the submission to the electors, contemporaneously with the general municipal elections, of the question whether

such limitation was desirable or not, reserving, however, to the council, the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of \$300 out of municipal funds in advertising the vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other rate-payers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an interim injunction was moved for to restrain the defendants from submitting the question to the electors and from printing ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions.

Held, 1. That in so far as the application depended upon the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial.

2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction should not be restrained, there being no express legislative prohibition, and the council, having acted *bond fide*, unless some good reason were shown for the conclusion that the result would be injurious or unjust to the corporation or some of its members, which was not shown in this case.

Semble, That if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law to the vote of the electors would have been illegal and *ultra vires*, and would have been restrained.

Helm v. Port Hope, 22 Gr. 293, distinguished. *Davies v. The City of Toronto et al.*, 33.

4. *By-law to open road—Private interests—Consent of County Council—Statutory notices.*]—The municipal council of the township of Sidney passed By-law No. 279, to open a road east and west across four farm lots in the first concession of the township. A travelled road was already open from Belleville westward to the east end of the road to be opened under the by-law, at which point a side road ran north and south through the township. After crossing three lots, the proposed new road would intersect another north and south side road and, crossing this side road, it would extend westward across one more lot as a *cul-de-sac*. The applicant contended that this by-law was passed, not in the public interest, but to serve the private convenience of two land-owners of the locality. It was, in answer, sworn by the members of the township council that they intended to complete the road as soon as possible across five more lots to the westward, till it would reach the next north and south side road through the township.

This explanation was accepted by the Court as answering any apparent presumption that the by-law was not passed in the public interest, as in this case none of the other circumstances were present which in other cases have led to the belief that pri-

vate interests only were being considered in passing the by-law.

The proposed road was to be only 40 feet in width. The authority of the county council in this behalf was not obtained till after the by-law had been passed, and this application to quash it made.

Held, that the consent of the county council, though a condition precedent to the laying out of the road was not a condition precedent to the passing of the by-law.

The statutory notices of the proposed by-law described the road as intended to cross not only the four lots mentioned in the by-law, but also the five others next west of them.

Held, following *Baker and Saltfleet* 31 U. C. R. 386, that this variance was not fatal to the by-law. *Re Ostrom v. Corporation of the Township of Sidney*, 43.

5. *By-laws opening roads—Free roads—Rights of owners of toll roads—Joint management between municipalities—By-law creating “future indefinite contingent liability”—ultra vires—Conditional by-law—Invalidity.*]—A by-law was passed by the city of Hamilton on the 10th January, 1887, granting \$5,000 towards the construction of a free road leading into Hamilton from the east, to be paid when and so soon as the sum of \$3,500 should have been contributed by the corporation of the township of Barton, or any other municipality and private subscribers, and actually expended on the work of construction of the said roads or on the purchase of the right of way therefor. The payment was also made conditional on the construction of the roads in manner, and on the terms, and subject to the conditions as in the by-law contained.

Among other conditions was one

that no moneys should be paid until the council of the township of Barton should have passed a by-law for the assumption of the said roads, and the proper maintenance thereof by the said township, and until an agreement should have been entered into between the corporation of the said township, and the corporation of the city of Hamilton, providing for the maintenance of the said roads in a proper state of repair, and as free roads for all time to come; and it was further provided that before any moneys were paid, the city was to be satisfied that the eastern free road should provide connection with the present system of township roads to secure *free travel*, from the top of the mountain, &c.

No date was fixed for doing the work or paying the money, and no provision was made for levying the amount during the municipal year, nor was the by-law submitted to the vote of the people.

Held, that the by-law created a future indefinite and contingent liability, and if such a by-law was valid at all, it ought to have been submitted to the vote of the ratepayers.

The city derived income from certain sources independent of taxes, but this income with the taxes levied left a deficiency which had been met by borrowing money, which was still unpaid, and no appropriation had been made for the payment of the \$5,000.

Held, that this did not validate the by-law without submission to the people.

Resolutions and a by-law of the township of Barton, dependent upon the Hamilton by-law, held invalid, as being part of an invalid arrangement attempted to be made under sec. 555 of the Municipal Act of 1883.

Held, also, that the arrangement, if valid on other grounds, and one for their joint benefit, might be entered into under sec. 555 by the municipalities.

Held, lastly, that a by-law passed to open a free road, solely for the purpose of enabling the public to avoid travelling upon a toll road, and thus avoid the payment of tolls, the "free road" not being otherwise required for the public convenience—could not be supported, and the by-laws and resolutions were quashed. *In re Carpenter et al. and the Corporation of the Township of Barton et al.*, 55.

6. *Non-repair of drains—Necessity of notice before action—47 Vic. ch. 8 (O.)*—*Held*, affirming the decision of ROSE, J., that the proper construction of R. S. O. ch. 33, sec. 30, sub-sec. 3, as also of the re-enactment in 47 Vic. ch. 8 (O.), is that as a pre-requisite to the maintenance of an action for damages arising from neglect to repair, there should be reasonable notice in writing given by the plaintiff to the municipality alleged to be in default, and this requirement is not confined to the remedy by mandamus.

Held, therefore, in this action, in which the plaintiff sued a municipality for flooding his lands by not providing a proper outlet for certain drains; and also by not repairing the drains; that inasmuch as there was no evidence of injury, other than arising from the non-repair, and as to this no statutory notice had been given, the plaintiff's action must be dismissed. *Crysler v. The Township of Sarnia*, 180.

7. *Bridge—"Approaches," meaning of—Liability of local municipality not taken away by sec. 530*

of the *Municipal Act*.]—Sec. 530 of the *Municipal Act*, 46 Vic. ch. 18 (O.), provides that “the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by the local municipalities in which they are situate.”

The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within 100 feet from the end of the bridge, but it was not shewn that there was any artificial structure to enable the public to pass from the road on to the bridge and from the bridge on to the road which would cover the point where the accident occurred.

Held, reversing the judgment of ROBERTSON, J., at the trial, dismissing the action.

1. That the word “approaches,” in the section, means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not include the highway to the distance of 100 feet from each end of the bridge, at all events, unless the artificial structures extend so far.

2. That in any case sec. 530 does

not relieve the local municipality from its statutory liability to repair, but merely gives to such municipality the right to enforce its provisions against the municipality or municipalities owning the bridge. *Traversy v. Gloucester*, 214.

8. *Pathmaster — Public duty — Private interest*—*R. S. O. (1877) ch. 73, sec. 1—Liability—Acquiescence by corporation—Compensation under Municipal Act—Assessment of damages.*]—A pathmaster is “an officer or person fulfilling a public duty” within the meaning of *R. S. O. (1877)*, ch. 73, sec. 1, and for anything done by him in the performance of such public duty, he is entitled to the protection of the statute; but where, professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual.

And where a pathmaster of a township in the course of his employment so acted as to disentitle himself to the protection of the statute, and thereby caused damage to the plaintiff

Held, that the township corporation as well as the pathmaster was liable; and even if not originally so, the corporation made itself liable by sanctioning what was done, and refusing to amend it after notice.

Damage to land arising from an overflow of water caused by negligently diverting the water from its natural course without providing a sufficient outlet, is not the subject of compensation under the *Municipal Act*, 1883.

Since the *O. J. Act* damages should be assessed up to the date of

judgment. *Stalker v. Township of Dunwich et al.*, 342.

9. *Ice on sidewalk—Water running down lane in front of sidewalk and freezing—Evidence of negligence.*—By reason of ice on the sidewalk on Yonge street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk; the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk, and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there.

Held, that there was no evidence of negligence on the part of the defendants. *Forward v. The Corporation of the City of Toronto*, 370.

10. *Drainage by-law—Municipal Act, 1883, sec. 570 et seq.—Majority of land-owners—"Mechanical operations"—Notice—Allowance of lump sum for roads—Duties of Engineer.*—Upon a motion to quash a by-law providing for the assessment of certain owners of lands for the cost of drainage work for the benefit of their land, under sec. 570 *et seq.* of the Municipal Act, 1883:

Held, 1. That the petition of land-owners for such by-law should include a majority of all the persons whom the engineer finds to be benefited by the proposed work.

Re Romney and Mersea, 11 A. R. 712, and *Re Dover and Chatham*, 12 S. C. R. 321, followed.

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2. That the engineer is at liberty to leave out of his scheme portions of the land mentioned in the petition, and the calculation as to the necessary majority should be made without considering the owners of such land.

3. That a petitioning land-owner has the right to withdraw his lands from the scheme before action has been taken under the engineer's report, and that if he does so he should not be reckoned as a petitioner in making the calculation.

Re Misener and Wainfleet, 46 U. C. R. 457, followed.

4. But even where, applying these principles, it is determined that the proper proportion of persons interested have not petitioned, a by-law valid on its face, passed by the council without objection, and under a *bonâ fide* belief, concurred in at the time by all parties concerned, that they had been properly set in motion, should not be quashed.

5. The words "mechanical operations" in sub-sec. 8 of sec. 570 of the Municipal Act must not be read in their widest sense; the provisions of the sub-section requiring a two-thirds majority are not intended to apply to every case in which it may become necessary to build or heighten a bank at the side of a drain, or to strengthen it in places by the addition of timber or logs.

6. The applicants to quash the by-law, having followed in their application the notice given by the council under sec. 572 to intending applicants, should not be prejudiced because that notice was incorrect; the council must be held to their own notice.

7. The allowance in the engineer's report of a lump sum as "chargeable to municipality for roads" was sufficiently definite, there being only one municipality concerned.

Re Essex and Rochester, 42 U. C. R. 523, distinguished.

8. the engineer, having himself made an inspection of each lot and estimated how much each would be benefited by the drain, might properly delegate to an assistant the duty of making a calculation upon the basis established by him. *In re Robertson et al. and The Corporation of the Township of North Easthope*, 423.

11. *Boundary line roads—Deviations—Adjoining counties—Liability.*]—The counties of Victoria and Peterborough adjoin each other, and up to 1863, when they were disunited, were united for municipal and other purposes. The boundary line road between these counties, deviated in several places owing to natural obstructions. At the place in question, where the deviation was wholly in the township of Verulam, in the county of Victoria, and which deviation was recognized as a deviation from the boundary line, two bridges were built during the union, at the joint expense, and were treated as subject to the joint control and liability. By 42 Vic. ch. 47, (O.), which came into force on 5th March, 1880, a portion of the township of Harvey, in the county of Peterborough, adjoining Verulam, including the part opposite to the place in question, was detached from Harvey and joined to Verulam for municipal and other purposes as is enacted, as if it had always been part of Verulam. In 1879 a new bridge was built at the said place, and an arbitration had between the counties, and on May 18th, 1880, after the said Act came into force, an award was made settling defendants' share of the cost, which they paid. In 1887, the bridges having got into

disrepair, the plaintiffs appointed their arbitrators to settle the cost of repair, &c.; but defendants refused to join in the arbitration, contending that since the 42 Vic. no liability therefor was cast on them. The inhabitants of certain portions of the adjoining townships in Peterborough continued to use these bridges, which were their only means of access to their county town and market.

Held, that the road at the said place must still be considered the boundary line road, and defendants were liable for the maintenance and repair of the bridges. *The Corporation of the County of Victoria v. The Corporation of the County of Peterborough*, 446.

12. *Drainage—Work done in excess of Contract—Necessary work—Liability of corporation.*]—A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor, under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points, where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles so far as laid to be taken up and relaid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by contract.

By amendments to the Municipal Acts, councils, in the case of drainage works, are authorized to make an assessment upon the property of those benefited when the means provided are not sufficient: and any damages recovered in proceeding respecting such works are to be charged against the lands benefited.

It was proved that the work done was absolutely necessary, for without it the drain would have been useless. No formal resolution of the council was passed authorizing this work to be done, nor was there any contract therefor under the corporate seal. In an action against defendants to recover the value of such work.

Held, that the defendants were liable therefor. *Green v. The Corporation of the Township of Orford*, 506.

See PRINCIPAL AND SURETY, 1, 3.

NEGLIGENCE.

See MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 9. RAILWAYS AND RAILWAY COMPANIES, 1.

NEW TRIAL.

Weight of evidence—Costs.]—Replevin for a piano delivered to the defendant as alleged by plaintiffs under an agreement that the piano was received by the defendant on hire for six months at \$5.00 a month, with right of purchase at \$265, \$15 cash, and the balance by instalments, and until purchase money paid the piano to remain the plaintiff's property; that default was made in the payments, and that the plaintiffs were entitled to take possession of the same. The defen-

dant stated that she purchased the piano, no mention being made at the time of the agreement, which was subsequently signed without defendant's authority by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, shewed authority from the defendant to sign, and also ratification by her. The jury found for the defendant.

The Court, not being satisfied with the finding, directed a new trial, with costs to the successful party in the cause. *Heintzman et al. v. Graham*, 137.

NOTICE OF ACTION.

See MUNICIPAL CORPORATIONS, 6.

OVERHOLDING TENANT.

See LANDLORD AND TENANT, 2.

PARTNERSHIP.

1. *Dissolution—Good-will—Injunction—Chancery decree—Estoppel.*]—A partnership deed was executed by the defendants O. & H., and by M. as malsters and brewers in Toronto for three years, whereby O., for \$25,000, sold to H. and M. all his interest in the good-will of the firm, &c., theretofore existing between himself and O. M. H. as brewers, &c., as also that which he would be entitled to on the expiration or sooner determination of the partnership then formed, and agreed to assign the same to them, and to execute a good and sufficient deed therefor; and also agreed in the meantime to fully initiate H. & M.

in the business. Clause 19 provided for the accounts being taken at the expiration or sooner determination of the partnership, and for payment to the partners of the value of their shares. Clause 21 provided, in case of death of any of the partners, for the payment to his representatives of his share in the partnership property and effects ; but as respects O., nothing should be paid for good-will. By clause 26, in case of death of either H. or M. before the expiration of the term, the survivor should pay the deceased's representatives, in addition to what they should be entitled to under clause 21, \$12,500 in full of the good-will bought from O. By clause 27, in case of the dissolution of the partnership before the expiration thereof, either by death of one of the partners, retirement under clause 2, or by compulsion under clause 3, in case of O., the other two might carry on the business and share equally in the losses and profits ; but in case of H. or M., then the partnership should be continued until the expiry of the three years, and the one remaining on should have the option of buying the other's interest in the capital stock and assets, and be entitled to half the profits, and liable for half the losses. By clause 29, if either H. or M. should retire under clause 2, or be compelled to leave under clause 3, he should not be entitled to receive anything for the good-will. Clause 3 provided for dissolution upon breach or non-observance of any stipulation in certain of the articles, upon notice in writing being given thereof ; and the parties receiving notice should be considered as quitting the business for the benefit of the other partners. Subsequently M. misconducted himself in the business, when O., acting for himself and H., in-

formed M. that he must leave the firm. A paper was then drawn up in the shape of a notice, and signed by O. H. & M., stating that the partnership was that day "dissolved by mutual consent, Messrs. O. & H., will continue the business, are authorized to collect all debts due to the late firm, and will meet all liabilities ;" and under this there was a further notice, signed by O. & H., stating they, O. & H., had that day, "entered into partnership as brewers, &c., under the new style of O. & Co., who will continue the business as formerly." A suit was brought in the Chancery Division by the now plaintiff, as assignee of M. under an assignment to her, and a decree made for an account, but not as to the good-will, because, as stated, it was held that the good-will did not pass thereunder. The good-will was then assigned by M. to plaintiff, and an action brought to recover the value thereof, and for an injunction to restrain the defendants from using the assets, and that the business might be sold as a going concern.

Held, [CAMERON, C.J., dissenting], that there was no forfeiture of M.'s interest in the good-will ; that the effect of the clauses relating thereto in the partnership articles was to separate the good-will from the rest of the assets, and that the reasonable intendment from what was done at the time of dissolution was that defendants should pay a reasonable sum therefor ; and therefore M., and so plaintiff, was entitled to recover the value thereof, which must be deemed to be \$12,500 ; but that the injunction must be refused, for that M. had agreed that defendants might use the good-will in continuing the business, and, having so agreed, he could not interfere with them in so doing ; that both parties were es-

topped by the chancery proceedings, the plaintiff from denying the defendant's right to enjoy the assets of the business, and the defendants from setting up a forfeiture under clause 3. *Mead v. O'Keefe and Hawke*, 84.

2. *Goods supplied to inchoate company—Sale of goods—Co-operative association—R. S. O. ch. 158.*]—The defendants (other than C.) and others signed a certificate of their intention to become incorporated as a co-operative association under R. S. O. ch. 158. They failed, however, to fulfil the requirements of the Act, and never actually became a corporation under it. In the meanwhile the plaintiff supplied the defendants and other intended members of the association with certain goods, and now sued the former for the balance due in respect thereof.

Held, [affirming the decision of *BOYD, C.*,] that he was entitled to judgment against the defendants as partners; but as to C., who came into the arrangement at a later date than the others, only as to goods supplied after such later date. *Seiffert v Irving et al.*, 173.

3. *Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 Vic. ch. 26 (O.)—Rights of assignee—Fraudulent preference—Amendment—Rule 103.*]—The firm of R. & Co., consisting of three members, supplied goods to the defendants, and subsequently one of the members retired, and transferred his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and afterwards made an assignment to E., under 48 Vic. ch. 26 (O.), for the benefit of their creditors. E., as assignee, sold to the plaintiff the debt

supposed to be due from the defendants to R. & Co. for the price of the goods supplied and also the interest of R. & Co. in any goods supplied and charged to anyone, remaining unsold, and the plaintiff brought this action to recover the same.

The goods in question, however, were not purchased by defendants, but were consigned to them for sale by R. & Co., by whose instructions the proceeds of the goods actually sold were remitted to H. & Co., to whom they had been assigned by R. & Co.

At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The learned Judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action refusing to add H. & Co. as parties.

The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue, remaining unsold, of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the right of H. & Co., if the transfer to them should be upheld, or absolutely if that transfer should be set aside as a fraudulent preference.

Held, 1. That these questions were "questions involved in the action" within the meaning of Rule 103, having regard to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule, but that the amendment must be confined to the plaintiff's possible rights.

2. That by sec. 7 of 48 Vic., ch. 26, E. was the only person entitled

to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co., but that transfer was not made by the same firm of R. & Co. which assigned to E.; that the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those only against whom a fraudulent preference by the original firm could be declared void: that the plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants, his claim against them to be limited to an account of their debt and of payments on account thereof, and, as against the original defendants, to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied; and by adding E. as a plaintiff upon filing his consent, payment by the plaintiff of the defendants' whole costs to be a condition precedent.

FALCONBRIDGE, J., *dubitante*, as to the disposition of costs. *Adams v. The Watson Manufacturing Co., (Limited.)* 218.

PATHMASTER.

Duties of.]—See MUNICIPAL CORPORATIONS, 8.

POLICE MAGISTRATE.

Jurisdiction of when holder of commissions both in a county and a town.]—See CANADA TEMPERANCE ACT, 2.

More than one in a county.]—See CANADA TEMPERANCE ACT, 2.

Right of to sit in city to hear offence when appointed for county.]—See CANADA TEMPERANCE ACT, 6.
—COURTS.

POSSESSION.

Demand of.]—See HUSBAND AND WIFE, 2.

By husband of wife's land.]—See HUSBAND AND WIFE, 2.

PRACTICE.

What questions Judge should decide.]—See HUSBAND AND WIFE, 2.

PREFERENCE.

See FRAUDULENT PREFERENCE.

PRESCRIPTION.

Right by.]—See WAYS, 2.

PRINCIPAL AND SURETY.

1. *Municipal corporation—Bond—Release of surety—New bond.*]—

A bond, intended to be joint and several, was drawn up, to be executed by G., who was plaintiffs' treasurer, and by L. and A. as his sureties. A. executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to run as a councillor, A. requested the council to release him from the bond, which was agreed to, and on 17th January, 1887, a formal reso-

lution was passed accepting H. as surety in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A. on the first bond,

Held, that he was not liable thereon. *The Corporation of the Township of Oxford v. Gair et al.*, 362.

2. *Limited term of employment of principal — Subsequent extension — Construction of bond — Estoppel.*]— M. having been employed by the plaintiff as a sub-agent in the collection of money, &c., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M., and was conditioned that if M. should, from time to time and at all times thereafter, account and pay to the plaintiff, &c., and at all times during such period as he should act as agent, &c., pay all sums received, &c., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond, and was only till the 31st December, 1884, but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M., by subsequent arrangement, continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886.

Held, notwithstanding the want of knowledge on the part of the sureties, that the appointment recited in the bond, must be taken to have referred to the appointment made before its date; and that the creditor and the principal could not,

by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period, did not justify the position that the sureties must have contracted with a view to a subsequent extension.

A letter was written by one of the sureties to the plaintiff on 17th December, 1886, in which he notified the plaintiff that from that date he withdrew from his suretyship.

Held, that this could not estop the surety from denying his liability; and even if it was to be read as shewing that the surety assented to the continuation of the employment of M., it was immaterial.

Kitson v. Julian, 4 E. & B. 854, and *Sanderson v. Aston*, L. R. 8 Ex. 73, followed. *Wickens v. McMeekin et al.*, 408.

3. *Collection of taxes by treasurer — Liability of surety for.*]—By R. S. O. ch. 180, sec. 10, as amended by 44 Vic. ch. 25, sec. 12 (O.), no assessor or collector shall hold the office of clerk or treasurer. The treasurer of plaintiffs, who was also clerk, was in that capacity permitted by resolution of the council to retain the collector's roll for three months, and he was granted a per centage on moneys received by him for taxes.

In an action against him and his surety,

Held, that that temporary function was not of such a nature as to terminate his duties as treasurer by necessary implication, and that when the money came to his hands with which he charged himself as treasurer, the responsibility of the surety began, but that the latter should not be charged with any sums which did

not appear in the books of the former as treasurer, and which were referable to taxes otherwise received by him. *The Corporation of the Village of Weston v. Conron et al.*, 595.

PRIORITY.

Of mortgage over Mechanics' Lien.]
—See MECHANICS' LIEN, 2.

PROBATE.

Validity of—Right to question.]
The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court. The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will.

Held, on demurrer, that the defence was bad: that when it is desired to attack the validity of a probate, issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the Court.

Irwin v. Bank of Montreal, 38 U. C. R. 375, followed.

Quære, whether the application must be to the Surrogate Court or not. *Book et al. v. Book*, 119.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC SCHOOLS.

Application for grant—Municipal corporations—Two-thirds vote—R. S. O. (1887) ch. 226, sec. 35.]
—*Held*, that under R. S. O. (1877) ch. 226, sec. 35, if on the application of a high school board to a municipality for a grant of money, less than two-thirds of the members present at the meeting of the council for considering the same, vote against the grant, it amounts to an affirmance and acceptance of the application, and finally fixes the municipality with the liability to raise the amount required; and if such application is in the form of a proposal for a by-law, authorizing the grant, (which *semble* it need not be), and less than a two-thirds vote is given against such by-law, it must be deemed to have been carried, and cannot be repealed as in the case of an ordinary by-law, before it is acted on.

Re Board of Education of Napanee and the Corporation of the Town of Napanee, 29 Gr. 395, cited and followed. *The Oakwood High School Case*, 686.

RAILWAYS AND RAILWAY COMPANIES.

1. *Accident—Contributory negligence—Engine and tender, whether constitutes train—Obligation to ring bell or blow whistle—R. S. C. ch. 109—Judgment where jury disagree.*]
The defendants' station at A. was on what was known as the side track, between which and the main track there was a centre platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to

cross over the side track to reach the centre platform, when the engine and tender which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed.

Held, that the plaintiff's evidence having shewn that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them.

Quære, whether an engine and tender constitute a train within sec. 52 of R. S. C. ch. 109, so as to require a man to be stationed on the rear thereof to warn persons of their approach; but in any event, there was a man so stationed here who did give warning.

Held, also, that the statutory obligation to ring the bell, or sound the whistle, only applies to a highway crossing, and not to an engine shunt on defendants' own premises. *Casey v. The Canadian Pacific R. W. Co.*, 574.

2. *Incorporation by Provincial Act—Subsequent legislation by Parliament of Canada—Applicability of secs. 4 to 39 of the general Railway Act of Canada.*—A railway company, incorporated by an Act of the

Ontario Legislature, was thereby authorized to construct, equip, and operate a railway between certain points.

By an Act of the Dominion Parliament the Governor-in-Council was authorized to grant a subsidy to the company; and by another Act of Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament.

Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected; that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada" (sec. 3 of the Railway Act of Canada, R. S. C. ch. 100); and therefore secs. 4 to 39 of R. S. C. ch. 109 did not apply to it; and a motion to a Judge of the High Court of Justice under sec. 8 for a warrant of possession of certain lands was refused. *Re St. Catharines and Niagara Central R. W. Co. and Barbeau*, 583.

3. *Expropriation of lands—Dominion Railway Act or Provincial Railway Act—Work for general advantage of Canada—Notice.*—In an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a County Judge for a warrant for possession of certain lands re-

quired by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served as required by the provisions of the Ontario Railway Act.

Held, under the circumstances of this case, and following *Clegg v. The Grand Trunk Railway Co.* 10 O. R. at 713; and *Darling v. The Midland Railroad Co.* 11 P. R. 32; that the defendants were no longer within the operation of the Ontario Statutes.

Held, also that a notice requiring the lands given under the Dominion Railway Act, was not a sufficient notice under the Provincial Railway Act. *Barbeau v. The St. Catharines and Niagara Central R.W. Co.*, 586.

4. *Dominion Railway—R. S. C. ch. 109, sec. 6, sub-sec. 12; sec. 27—Line built through lands under Ontario timber license—R. S. O. ch. 26—Timber cut within and outside six rod belt—Limitation of action.*—The defendants, a railway company, incorporated under an Act of the Parliament of Canada, built their railway through land in this Province the fee of which was in the Crown, but which was under a timber license issued by the Ontario Government, under R. S. O. ch. 26, to the plaintiffs. The defendants cut down and removed the timber both within and outside the six rod limit mentioned in sub-sec. 12 of sec. 6 of R. S. C. ch. 109. The timber was all cut more than six months before action brought

Held, that under the said sub-sec. the timber cut within the six rod limit, became the property of the

railway, and that the loss of the trees was damage or injury sustained by the plaintiffs by "reason of the railway," under sec. 27 of R. S. C. ch. 109, and the action was therefore barred by that section by reason of its not having been brought within the six months. *McArthur et al. v. The Northern and Pacific Junction R. W. Co. and Hendrie, Symons & Co.*, 733.

Damages for not running trains to points contracted for.—See DAMAGES, 2.—MASTER AND SERVANT, 1.

RECEIVER.

Receiver by way of equitable execution—Incumbered lands—Rents—R. S. O. ch. 65.—Under the Judicature Act the Court has power to award equitable execution after judgment in any and every case where it is just and convenient to do so. Where writs of execution had issued, but had not become exigible against the lands (subject to mortgages) of a judgment debtor possessing no personalty, and who was collecting the rents and paying other creditors, a receiver of the property was appointed by way of equitable execution to collect the rents, subject to the rights of the mortgagees, and to apply them for the benefit of creditors under the Creditor's Relief Act.

In such a case the receiver should be an officer of the Court. *Kirk et al. v. Burgess et al.*, 608.

REGISTRY LAWS.

See MECHANICS' LIEN, 3.

REPLEVIN.

See SALE OF GOODS, 1.

REVENUE.

Customs duties—Lien of Crown—Writ of extent—Preference of Crown over subject—R. S. O. (1887) ch. 94.]

—On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 Vic. ch. 26 (O.), and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the customs department, B., on giving security therefor to the Crown, had sold before the assignment, certain other coal, imported by him, without first paying the duty upon it.

Held, 1. That there was nothing in the Customs Act, R. S. C. ch. 32, nor in law, giving the Crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him.

2. That the issue of a writ of extent by the Crown against B. on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal would have availed the Crown nothing, so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff.

3. That the claim of the Crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors: the principal that when the right of the Crown and the subject come into competition, that of

the Crown is to be preferred, in any case has now no existence in Ontario, because the effect of R. S. O. (1887), ch. 94 is to do away with any distinction between debts due from the subject to the Crown and debts due from the subject to the subject, and to place them all upon the same footing.

Such principle, although it has been applied to winding-up proceedings instituted under statutes in which the Crown is not bound, and where the property was not divested out of the Crown debtor, in not applicable to estates in bankruptcy or assigned in trust for creditors. *Clarkson v. The Attorney-General of Canada*, 632.

SALE OF GOODS.

1. *Replevin — Obtaining goods under false pretenses—Factor's Act, R. S. O. ch. 121, secs. 2, 4, 5—Agent "Entrusted"—Property passing.]* — F., a music teacher at Beardstown, Ill., wrote to K. & Co., at Chicago, that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return piano to plaintiffs, he, F., simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to plaintiffs, piano manufacturers in Chicago, who after communicating with F., shipped a piano to Beardstown, consigned to their own order, but to be delivered to F., on payment of the freight charges. The piano was received by F. at Beardstown, and its receipt acknowledged in a letter to plaintiffs. It was shipped by F. to Virginia City, Ill., and from there

to F. at Toronto, under the assumed name of R., and was there pledged by F. under such assumed name, with defendant D., a pawnbroker, to cover an amount loaned by D., to pay the charges as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied.

Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him.

Held also, that F. was not an agent within the meaning of the Factor's Act, R. S. O. ch. 121, secs. 2, 4, 5, so as to enable him to pledge the piano; nor, per ROSE, J., was he an agent "entrusted with the possession of goods." *Bush et al. v. Fry et al.* 122.

2. *Material condition in contract—Refusal to accept—Action for deposit and damages.*]—The plaintiff purchased a quantity of lambs from the defendant to be consigned to plaintiff's firm at Buffalo, which condition plaintiff stated he inserted in the contract "to help our business, *

* and to help build the firm up," the firm being a new one. Defendant disregarded this condition and shipped the lambs to another name, and plaintiff refused to accept delivery. In an action for the deposit paid at the time of the contract and for damages, it was

Held, (affirming ROSE, J.,) that the term of the bargain as to the manner of consignment was a material part of it; material to the plaintiff as the defendant well knew, and following *Bowes v. Shand*, L. R. 2 App. Cas. 455, that the plaintiff must succeed.

Norrington v. Wright, 115 U. S.

Rep. 188, specially referred to. *McLean v. Brown*, 313.

3. *Contract—Delivery of part—Absence of brand—Quality of goods—Testing—Acceptance—Property in part not delivered—Costs.*]—

The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire Crown Bar iron of the T. K. brand. A part of the iron was delivered to the defendants, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it; and finding it unsatisfactory, declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable, but not equal in quality to the standard T. K. Crown brand.

Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to the defendants merchantable iron bearing on its face the genuine brand contracted for; but in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co., of the quality usually indicated by the Crown brand, and so the defendants would have the right to test it, and according to the findings of the jury would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard, did not estop the defendants from shewing that the portion which was unbranded was also below the standard. But

Held, that the defendants, having used in the manufacture of their ma-

chines, after the doubtful quality of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession.

Held, also, that the property in the part of the iron which was not delivered to the defendants, must be taken to remain in the plaintiffs; for the defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it.

The action was treated as one for the price of iron, which the defendants accepted, and for damages arising from their refusal to accept the remainder, and, in accordance with the findings of the jury, which in the opinion of the Court were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only, (the damages having been negatived by the jury); and for the defendants upon their counterclaim for damages sustained from the breach of contract, other than by reason of the inferior quality of the iron; and the plaintiffs were allowed the costs of the action, and the defendants the costs of their counterclaim. *Bertram & Co. v. The Massey Manufacturing Company et al.*, 516.

4. *Agreement to sell—Property not to pass—Stipulation for taking possession—After-acquired property—Registration—R. S. O. ch. 125.*—J. R. by an instrument in writing, agreed to sell his business and stock-in-trade to his sons, and by it provided that all the existing stock was

to remain his property until it was paid for; that all after-acquired property brought in by way of substitution for existing stock, was to become his property by way of security for the purchase money, and that on default he should have the right to re-enter and take possession. Some seven years afterwards, default having been made, he took possession and began by selling off by auction. The sons then made an assignment for the benefit of creditors. In an action brought by the assignee and some creditors of the sons to restrain J. R. from selling, it was

Held, that the legal operation of the instrument of sale was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made, and possession taken before the rights of the assignee or of any execution creditor arose, that act clothed J. R. with the legal title in the after-acquired goods, which was not affected by the assignment for creditors subsequently executed.

Held, also that the instrument did not need to be registered to make it operative against subsequent creditors: the Bills of Sale and Chattel Mortgages Act, R. S. O. ch. 125, not covering the case of agreements creating equitable interests in non-existing and future-acquired property.

The effect of the transaction in this case and the advisability of making provision for giving publicity by registration commented on. *Banks et al. v. Robinson et al.*, 618.

See CONTRACT, 2.

SCRIVENER.

See SOLICITOR AND CLIENT, 2.

SEIZURE.

By sheriff liability for.] — See SOLICITOR AND CLIENT, 1.

SET-OFF.

See COMPANY, 5.

SHAREHOLDERS

Cannot institute winding-up proceedings.]—See COMPANY, 2.

Rights of as to appointment of Liquidators.]—See COMPANY, 3.

SHERIFF.

See SOLICITOR AND CLIENT, 1.

SHOPS AND TAVERNS.

By-law limiting number of Tavern Licenses.]—See MUNICIPAL CORPORATIONS, 1.

SOLICITOR AND CLIENT.

1. *Liability of execution creditors for wrongful seizure—Liability for acts of solicitor.]—The defendants, who lived in Hamilton, had a claim against W. at Ingersoll, and thinking he was carrying on business on his own account issued, a writ therefor through their solicitors C. & B., which was served by C. who went to*

Ingersoll under special instructions from defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff who accordingly notified C. & B. C. & B. refused to accept this, and wrote the sheriff in effect that he had acted improperly in not seizing the goods, on *ex parte* statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The goods were proved to be the plaintiff's. In an action to recover damages occasioned by the seizure.

Held, that the sheriff must be assumed to have seized, under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were acting under special instructions from the defendants to take such proceedings as they might think best, the latter were liable to the plaintiff.

Smith v. Keal, 9 Q. B. D. 340. distinguished. *Wilkinson v. Harrey et al.*, 346.

2. *Breach of duty by solicitor—Liability of partner—Scrivener's business.]—The defendants, who in 1878, entered into partnership as solicitors, carried on as part of their ordinary business that of investing moneys for clients. Previous to the partnership the defendant R. had been employed by the plaintiff to do that kind of business for her, and during the period of the partnership the whole of the money originally entrusted to R. was lost, through a breach of duty on the part of R. in*

investing it. From the commencement of the partnership down to March, 1883, after which time the breach of duty occurred, the account of the plaintiff was kept in the books of the firm, charges for services rendered were made against her, though not for the management of her affairs, or for services in making investments, and conveyancing charges were also made against borrowers from her funds, and the profits went to the account of the partnership.

The evidence shewed that the plaintiff insisted upon dealing with R. as her special adviser and solicitor; that she disliked W., and never consulted him as to her affairs; and that she wished her affairs to be kept as far as possible from the knowledge of anyone but R.

It also appeared from the evidence that R. was to share in the profits arising from the investment which resulted in the loss of the plaintiff's money, and that he did not make any charge for services in connection with it. Another fact shewn was that R. during part of the period of partnership kept the plaintiff's account in a book which he called his private ledger.

Held, (reversing the judgment of BOYD, C.,) that in making the investment R. was acting as solicitor for the plaintiff, and that he and his partner W. were both liable for the breach of his duty; and that none of the circumstances mentioned above operated to absolve them from liability as solicitors.

Semble, that in this Province the business which is called "scrivener's business" is a part of the ordinary business of a solicitor. *Thompson v. Robinson and Wilson*, 662.

SPECIFIC PERFORMANCE.

Contract for sale of land—Statute of Frauds—Written offer by purchaser not addressed to vendor—Contract completed by correspondence and initials on offer book.]—An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents, who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents.

The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer, letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents.

Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant. *Kennedy v. Oldham*, 433.

SPECULATION.

As a cause of dismissal.]—See MASTER AND SERVANT, 2.

STATUTES.

8 Anne, ch. 14, s. 1.]—See LANDLORD AND TENANT, 5.

26 Geo. II. ch. 33.]—See HUSBAND AND WIFE, 1.

32 Geo. III. ch. 1.]—See WILL, 5.

39 & 40 Geo. III. ch. 98.]—See WILL, 5.

22 Vic. (C. S. U. C.) ch. 106, s. 100.]—See HUSBAND AND WIFE, 1.

B. N. A. Act ss. 91 & 92.]—See CONSTITUTIONAL LAW.

32 & 33 Vic. ch. 29, s. 26 (D.)]—See CRIMINAL LAW, 1.

37 Vic. ch. 6, s. 1 (O.)]—See HUSBAND AND WIFE, 1.

39 Vic. ch. 26 (O.)]—See MUNICIPAL CORPORATIONS, 1.

Canada Temperance Act, s. 103, sub-s. b.]—See CANADA TEMPERANCE ACT, 6.

Canada Temperance Act, s. 115.]—See CANADA TEMPERANCE ACT, 4.

R. S. O. (1877), ch. 26.]—See RAILWAYS AND RAILWAY COMPANIES, 4.

R. S. O. (1877), ch. 33, s. 30, sub-s. 3.]—See MUNICIPAL CORPORATIONS, 6.

R. S. O. (1877) ch. 32.]—See MALICIOUS ARREST, 2.

R. S. O. (1877) ch. 108, ss. 5 & 44.]—See LIMITATION OF ACTIONS, 1.

R. S. O. (1877) ch. 109.]—See WILL, 3.

R. S. O. (1877) ch. 119, s. 6.]—See FRAUDULENT PREFERENCE.

R. S. O. (1877) ch. 65.]—See RECEIVER.

R. S. O. (1877) ch. 73, s. 1.]—See MUNICIPAL CORPORATIONS, 8.

R. S. O. (1877) ch. 120, ss. 4 & 20.]—See MECHANICS' LIEN, 1.

R. S. O. (1877) ch. 121, ss. 2, 4 & 5.]—See SALE OF GOODS, 1.

R. S. O. (1877) ch. 158.]—See PARTNERSHIP, 2.

R. S. O. (1877) ch. 180, s. 10.]—See PRINCIPAL AND SURETY, 3.

R. S. O. (1877) ch. 180, ss. 129 & 137.]—See ASSESSMENT AND TAXES.

R. S. O. (1887) ch. 181, ss. 17 & 24.]—See MUNICIPAL CORPORATIONS, 3.

R. S. O. (1877) ch. 181, s. 17.]—See MUNICIPAL CORPORATIONS, 1 & 3.

41 Vic. ch. 4, s. 9 (O.)]—See COURTS.

42 Vic. ch. 47 (O.)]—See MUNICIPAL CORPORATIONS, 11.

O. J. A. [44 Vic. ch. 5 (O)] s. 25, sub-s. 2.]—See HUSBAND AND WIFE, 2.

O. J. A. ss. 28 & 87.]—See COURTS.

O. J. A. Rule 103.]—See PARTNERSHIP, 3.

O. J. A. Rule 321.]—See MASTER AND SERVANT, 2.

O. J. A. Rule 370 & 376.]—See ATTACHMENT OF DEBTS.

O. J. A. Rule 484.]—See COURTS.

O. J. A.]—See MALICIOUS ARREST, 2.—MUNICIPAL CORPORATIONS, 8.

45 Vic. ch. 93, s. 18 (D)]—See CONTEMPT OF COURT.

Municipal Act, 1883, [46 Vic. ch. 18 (O)]—See MUNICIPAL CORPORATIONS, 8.

Municipal Act, 1883, s. 530.]—See MUNICIPAL CORPORATIONS, 7.

Municipal Act, 1883, s. 555.]—See MUNICIPAL CORPORATIONS, 5.

Municipal Act, 1883, s. 570.]—See MUNICIPAL CORPORATIONS, 10.

47 Vic. ch. 8 (O.)]—See MUNICIPAL CORPORATIONS, 6.

48 Vic. ch. 17 (O.)]—See CONSTITUTIONAL LAW.

48 Vic. ch. 17, s. 4 (O.)]—See CANADA TEMPERANCE ACT, 6.

48 Vic. ch. 26 (O.)]—See REVENUE.

48 Vic. ch. 26 (O.)]—See LANDLORD AND TENANT, 1.

48 Vic. ch. 26 (O.)]—See PARTNERSHIP, 3.

48 *Vic. ch. 26, s. 2 (O.)*—See FRAUDULENT PREFERENCE.

49 *Vic. ch. 4, s. 9 (O.)*—See CANADA TEMPERANCE ACT, 6.

49 *Vic. ch. 28, s. 3, sub-s. 5 (O.)*—See MASTER AND SERVANT.

R. S. C. ch. 32.—See REVENUE.

R. S. C. ch. 106, s. 17.—See CANADA TEMPERANCE ACT, 2.

R. S. C. ch. 106, s. 100.—See CANADA TEMPERANCE ACT, 3.

R. S. C. ch. 109, ss. 4-39.—See RAILWAYS AND RAILWAY COMPANIES, 2.

R. S. C. ch. 109, s. 6, sub-s. 12 and s. 27.—See RAILWAYS AND RAILWAY COMPANIES, 4.

R. S. C. ch. 109, s. 52.—See RAILWAYS AND RAILWAY COMPANIES, 1.

R. S. C. ch. 129.—See COMPANY, 2, 3, 4 & 5.

R. S. C. ch. 157.—See MALICIOUS ARREST, 2.

R. S. C. ch. 164, ss. 6, 19 & 23, sub-s. 2, ss. 44 & 84.—See CRIMINAL LAW, 1.

R. S. C. ch. 167, ss. 13 & 21.—See CRIMINAL LAW, 1.

R. S. C. ch. 168, ss. 24, 25 & 45.—See CRIMINAL LAW, 1.

R. S. C. ch. 174, s. 2, sub-s. 1, and s. 270.—See COURTS.

R. S. C. ch. 174, ss. 139, 207 & 230.—See CRIMINAL LAW, 1.

R. S. C. ch. 178, s. 13.—See CANADA TEMPERANCE ACT, 7.

R. S. C. ch. 174, s. 218.—See CRIMINAL LAW.

R. S. C. ch. 174, s. 234.—See EVIDENCE.

R. S. C. ch. 181, s. 25.—See CRIMINAL LAW, 1.

R. S. O. (1887) ch. 73, ss. 4, 10 & 11.—See MALICIOUS ARREST, 2.

R. S. O. (1887) ch. 94.—See REVENUE.

R. S. O. (1887) ch. 125.—See SALE OF GOODS, 4.

R. S. O. (1887) ch. 226, s. 35.—See PUBLIC SCHOOLS.

STOCKHOLDERS.

See COMPANY, 1.

SURETY.

Discharge of.—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—PRINCIPAL AND SURETY.

SURVEY.

Plan, part of description in deed —Effect of.—The rule of construction in cases of private plans, where a deed or plan is referred to as part of the description, is to read it into the deed.

Carter v. Grasett, 10 S. C. R. 105, followed.

In an action to determine the boundary between certain lots on a plan, the defendant's surveyor, instead of being governed by the plan, went behind it, making a new survey; and also took the apparent angles on the plan instead of the measurements.

Held erroneous. *Smith v. Millions*, 453.

TAXES.

Sale of land for.—See LANDLORD AND TENANT, 4.

See ASSESSMENT AND TAXES.

TAX SALE.

See ASSESSMENT AND TAXES—
LANDLORD AND TENANT, 4.

TELEGRAMS.

Destruction of.]—*See* CONTEMPT
OF COURT.

TELEGRAPH COMPANIES.

*Officers of—Production of tele-
grams.*]—*See* CONTEMPT OF COURT.

TENANT.

By the curtesy.]—*See* LIMITATION
OF ACTIONS, 1.

For life.]—*See* WILL, 4.

See LANDLORD AND TENANT.

TENDER.

And acceptance of contract.]—*See*
CONTRACT, 1.

THELLUSON ACT.

See WILL, 5.

TREASURER.

Collection of taxes by]—*See* PRIN-
CIPAL AND SURETY, 3.

Duty of on tax sale.]—*See* TAX
SALE.

ULTRA VIRES.

*To substitute the vote of municipal
electors for the decision of a coun-
cil as to the passing of a by-law.*]—
See MUNICIPAL CORPORATIONS, 3.

UNDUE INFLUENCE.

*Deed procured through threats, &c.,
—Setting aside.*]—The defendant, a
merchant and active business man,
had endorsed for G. Subsequently
G. made an assignment for the benefit
of his creditors, and on defendant
requiring security, G.'s wife gave de-
fendant her note for the amount. She
held some property which had been
purchased by her husband and con-
veyed to her, which was to be sold
and the note paid. G. sold the land,
but instead of paying the note, ab-
sconded, leaving his wife. The
defendant then went to Mrs. G.,
and by the use of abusive language
and threats of criminal prosecution
against her husband, and of exposure
of herself and him in the papers,
being of delicate constitution, fright-
ened her into procuring her mother,
a very old woman in feeble health,
influenced by the communication of
threats to her, to get the deed from
her solicitor of a small property she
owned, defendant giving strict in-
junctions not to inform the solicitor
of the object, lest he should dissuade
her, and to execute a deed to defen-
dant, conveying the property abso-
lutely to him in payment of the debt,
merely giving her back an informal
memorandum evidencing her right
to obtain a reconveyance on pay-
ment of the debt. At the same
time he procured Mrs. G. also to
execute the deed which contained a
clause barring dower she had in the
land, and which was absolute and
unconditional, and without any right
to her to redeem. The deed was
executed in the office of the defen-
dant's conveyancer, without anyone
being present to advise plaintiffs.

Held, (reversing the judgment of
ARMOUR, J., at the trial) that the
deed could not be supported as

against the mother, and must be set aside ; and also, under the circumstances, as against Mrs. G. *Sheard et al. v. Laird*, 533.

USE AND OCCUPATION.

See HUSBAND AND WIFE, 2.

VALUATOR.

Liability of—Misdirection.]—The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee.

The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The Judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence.

Held, [GALT, C. J., dissenting], this was misdirection.

It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was

a director, and that the loan was not effected, having been abandoned by the mortgagor. The Judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the enquiry: "Why was not the original transaction carried out?"

Held, per ROSE and MACMAHON, JJ., that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts.

K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from \$200 to \$300 per acre, but the Judge told the jury that K. was not in the land business, and had no knowledge of the value of the property.

Per ROSE, J.—The observations as to K. was a practical withdrawal of his evidence from the jury.

Per GALT, C. J.—There was evidence of negligence to go to the jury, particularly in defendant L. not making enquiries of others in the neighbourhood as to the value of the land.

A new trial was therefore directed. *O'Sullivan v. Lake et al.*, 544.

VENDOR AND PURCHASER.

Liability of purchaser to indemnify against existing mortgage.]—See MORTGAGE, 1.

VENDOR AND PURCHASER ACT.

See WILL, 2, 3.

WATERS AND WATERCOURSES

Drainage — Ditches and Watercourses Act, 1883, sec. 13—Award — Duty of township engineer—Damage to land—Proximate cause.]

After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring land-owners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work with the object of having it completed according to the award, but as the plaintiff alleged the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, &c.

Held, that the provision of sec. 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof. The other provisions of sec. 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance.

Those who by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages. *O'Byrne v. Campbell*, 339.

WAYS.

1. *Conditional grant of—Duty to maintain fences and gates on—Rights of grantor.*]

Plaintiff's predecessor in title had granted to defendant's predecessor in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, and put gates at each end of it, which, after remaining many years, rotted away.

Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely at the sides of the way in question, but also at ends of it, where they might have gates as part of the fences.

Held, also, that even if this was not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled, himself, to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used. *Clendenan v. Blatchford*, 285.

2. *Easement appurtenant to land conveyed—Prescriptive right to—Revocable license—Agreement, construction of by Court.*]

Some years prior to 1847, J. D., plaintiff's father, became the owner of lot 18 in 5th concession of York, and built the house in which he lived up to the time of his death, on the north-west half, and near the sixth concession line. In 1847, J. D. purchased lot 19 adjoining lot 18 on the north, the occupiers of the eastern portion of which prior thereto and J. D.'s tenants since, used a trail or road running from the northerly part of the east half of 18, where the plaintiff's house stood, across the west-half of 19 to the boundary between 18 and 19,

where there were several trails or roads across the west-half of 18 to a private lane leading in a westerly direction past J. D.'s house to the 6th concession. The trails ran through bush land, and no one was used continuously or exclusively, but as was convenient. In 1860, J. D. conveyed the east-half of 19 to plaintiff, and plaintiff also acquired by devise from his father, who died in 1877, the north-east quarter of 18, which adjoined the east-half of 19 on the south. The west-half of 19 J. D. devised to his daughter who had ever since been in occupation thereof, and the north west-half of 18 to his son W. who was living with him at his death, who conveyed to defendant. Shortly after J. D. had conveyed the east-half of 19 to him, the plaintiff with J. D.'s permission cut a new roadway outside of the woods on lot 18, connecting thereby with the lane to the 6th concession. In 1877, by an agreement entered into between plaintiff and W. D., in consideration of certain privileges granted to W. D., W. D. covenanted to permit plaintiff to have a right of way along the said lane from the 6th concession and extending 40 rods east of the centre of the lot, so as allow plaintiff free communication from the lot 19 along said lane to the 6th concession.

Held, that there was no defined right of way existing in 1860, over the west-half of 18, appurtenant to the east-half 19 so as to enable plaintiff to claim an easement therein as granted under the words therefor in the conveyance of 1860, that the user of the roadway cut in 1860 being merely permissive, there was no prescriptive right thereto, but merely a license, which was revocable at any time, and was revoked by the father's death, and thereafter, as the

evidence shewed, the user was regarded by W. as merely permissive, which was acceded to by the plaintiff in 1877 by his then entering into the agreement of that date.

Per MACMAHON, J.—The jury are to find specific questions of fact to which the Court must apply the law on the facts so found. The construction of the agreement was for the Court, and its meaning was that the old lane has to be extended easterly in a straight line for 40 rods. *Duncan v. Rogers*, 699.

WILL.

1. *Devise of land—Restraint on alienation—Invalidity of devise.*—Testator devised as follows: "I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them either by sale, by mortgage, or otherwise, except by will to their lawful heirs.

Held, that the condition imposed by the will was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restrictions above mentioned. *Heddlestone v. Heddlestone*, 280.

2. *Devise — Estate limited "to heirs but not assigns"—Fee simple—Vendor and Purchaser Act—R. S. O. ch. 109, (1877.)*—A devise in a will was as follows: "I also will, devise, and bequeath to my daughter L. A. the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married and had issue. In an application under the Vendor and Purchaser Act,

Held, that she took an estate in fee simple. *Re Traynor and Keith*, 469.

3. *Devise — Restraint on alienation—Estate tail.*—A testator, by his will, provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my real estate * * said estate being composed. * * I leave and bequeath the aforesaid estate to my son J. C., after my wife's death, * * and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs. Should my son J. C. die without heirs, the estate * * my daughters shall get their maintenance off said estate during * * . I also bequeath the sum of eighty dollars to each of my daughters, * * to be paid out of the said estate by my said son J. C." In an application under the Vendor and Purchaser Act, it was

Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject, however, to the charges of the several legacies to each of the testator's daughters. *Re Colliton and Landergan*, 471.

4. *Life tenant—Power to lease—Trustees.*—A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death, to sell and divide the proceeds among his children equally.

Held, that the wife had the right to leave the farm and deal herself directly with the tenant during her life.

In this case, those entitled in re-

mainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the Court would give effect to the usual incidents of an estate for life by which the tenant can occupy it or let it, or otherwise dispose of it as seems best to that tenant.

Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee. *Hefferman v. Taylor et al.*, 670.

5. *Period of distribution—Thelusson Act—39-40 Geo. III., ch. 98—32 Geo. III., ch. 1—Vesting subject to being divested—"Heirs-at-law."*—By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs at law." At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died.

Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take

in substitution for the original legatee, and,

Semble, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

Held, also, that the Act against accumulations, commonly called the Thelluson Act, 39-40 Geo. III. ch. 9, which was passed after the Statute 32 Geo. III. ch. 1, by which English law was introduced into Canada and which did not extend in terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that Statute. *Harrison et al v. Spencer et al*, 692.

6. *Devise for maintenance—Medical and funeral expenses—Estate charged therewith.*—A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother died, and during their last illness certain expenses were incurred for medical attendance, nurses, &c., and after their death for funeral expenses and English solicitor's fees in endeavoring to collect the several accounts for same.

Held, that the expenses were covered by the provision for maintenance, and an order was made for

their payment out of the testator's estate. *Howe et al. v. Carlaw et al.*, 697.

WINDING-UP ACT.

See COMPANY.

WORDS, CONSTRUCTION OF.

"*Actual first cost.*"—See CONTRACT, 3.

"*Approaches.*"—See MUNICIPAL CORPORATIONS, 7.

"*Being within the jurisdiction of such justice.*"—See CANADA TEMPERANCE ACT, 7.

"*By reason of the railway.*"—See RAILWAYS AND RAILWAY COMPANIES, 4.

"*During pleasure.*"—See CANADA TEMPERANCE ACT, 6.

"*Entrusted.*"—See SALE OF GOODS, 1.

"*Heirs at law.*"—See WILL, 5.

"*Mechanical operations.*"—See MUNICIPAL CORPORATIONS, 10.

"*Not guilty by statute.*"—See MALICIOUS ARREST, 2.

"*Scriveners business.*"—See SOLICITOR AND CLIENT, 2.

"*To heirs but not assigns.*"—See WILL, 2.

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